2006 Commercial Law Developments

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I. PERSONAL PROPERTY SECURED TRANSACTIONS*

A. *Scope of Article 9 and Existence of a Secured Transaction*

1. *General*

- *Espinosa v. United of Omaha Life Ins. Co.*, 137 P.3d 631, 60 UCC Rep Serv 2d 321 (NM Ct.App. 2006) – The debtor entered into a structured settlement agreement in connection with settling a tort claim. The settlement included an annuity. The debtor borrowed money and granted a security interest in the annuity. The annuity prohibited its assignment. Under former Article 9, the court held against the secured party. The scope of former Article 9 excluded all tort claims and insurance claims.

  Comment: Article 9 brought commercial tort claims within the scope of Article 9 in UCC § 9-109(d)(12) (although other types of tort claims remain excluded) but claims under an insurance policy remain excluded (unless they are health-care-insurance receivables or proceeds of collateral covered by Article 9, or under a non-uniform California version of UCC § 9-109). UCC §§ 9-109(d)(8), 9-315, 9-322. Note that there has been significant debate over the appropriate treatment of annuities under Article 9 and some states (including New York and Virginia) provide for special treatment of annuities in their versions of UCC § 9-109.

- *In re JII Liquidating, Inc.*, 344 B.R. 875 (Bankr. ND Ill. 2006) – A secured party had a security interest in unearned insurance premiums. The court applied UCC § 9-109(d)(8)'s exclusion of a transfer of an interest in or an assignment of a claim under an insurance policy and held that the unearned premiums were excluded from Article 9 as being within the insurance exclusion. Thus, Article 9 perfection requirements did not apply to the secured party's interest and the

* We would like to express our deep appreciation to the following for their important assistance in assembling these materials: Stephen Sepinuck, John F. Hilson, Harry Sigman and colleagues of Teresa at her firm who helped check all the cites. We also miss our good friend Jeff Turner.

secured party did not need to file a financing statement to perfect its security interest.

- *Banc of America Strategic Solutions, Inc. v. Cooker Restaurant Corp.,* 2006 Ohio 4567, 2006 Ohio App. LEXIS 4507 (Ohio Ct. App. 2006) – Security interest did not attach to Ohio liquor license because debtor had no property right in the liquor license under Ohio law. The court cited Comment 3 to UCC § 9-408, which notes "[n]either this section nor any provision of this Article determines whether a debtor has a property interest".

  Comment: UCC § 9-203(b)(2) provides that a security interest is enforceable against the debtor (*i.e.* "attaches") and third parties with respect to the collateral only if the debtor has rights in the collateral or the power to transfer rights in the collateral to the secured party. While UCC § 9-408 may invalidate a state law that would prohibit assignment of collateral such as a liquor license, there will still not be an enforceable security interest if as a matter of state law the debtor does not have sufficient rights in the collateral for the security interest to attach. The courts should be careful in deferring to definitions of "property" developed under other law for other purposes.

- *Decision Point, Inc. v. Reece & Nichols Realtors, Inc.*, 144 P.3d 706 (Kan. 2006) – A real estate agent granted a security interest in his right to receive commissions. The UCC would have permitted the assignment. The Kansas version of the Uniform Consumer Credit Code prohibited such an assignment. The court concluded that the UCCC applied rather than the Uniform Commercial Code because the UCCC's requirements for a consumer credit transaction has been satisfied.

  Comment: UCC § 9-201(b) and (c) provides that transactions that are subject to Article 9 are also subject to other applicable laws relating to consumers or specified in UCC § 9-201(b) and that the other (non-Article 9) law is controlling in the event of a conflict. *See also* Comment 3 to UCC § 9-201 and Comment 11 to UCC § 9-109.

- *American Investment Financial v. U.S.*, 364 F.Supp.2d 1321, 57 UCC Rep Serv 2d 94 (D.Utah 2005) – Payments owed to a health-care provider from health insurers for health care services provided by the

provider were health-care-insurance receivables and therefore within the scope of Article 9. UCC §§ 9-102(a)(46), 9-109(d)(8).

2. *Consignments*

   - *In re Haley & Steele, Inc.*, 20 Mass.L.Rptr. 204, 58 UCC Rep Serv 2d 394 (Mass.Super. 2005) – Because the definition of consignment in Article 9 excludes consignments of goods that are consumer goods (i.e. goods that are used or bought for use primarily for personal, family, or household purposes) immediately before delivery to the merchant for purposes of sale, the common law of consignment applies to determine the rights of parties to such a transaction. UCC §§ 9-102(a)(20), (23).

   - *In re Morgansen's Ltd.*, 2005 WL 2370856, 59 UCC Rep Serv 2d 1121 (E.D.N.Y. 2005) – The labeling of a transaction as a "consignment" does not necessarily mean that either Article 9 or Article 2 will apply if the transaction does not fit within the "consignment" provisions of those Articles. UCC §§ 2-326, 9-102(a)(20). The auction involved in this case did not meet those requirements.

3. *Real Property*

   - *In re Nittolo Land Development Ass'n, Inc.*, 333 B.R. 237, 58 UCC Rep Serv 2d 313 (Bankr. S.D.N.Y. 2005) – Article 9 applies to an "account" arising out of the sale of real property, even though the original transaction had been entered into prior to the effective date of Article 9. UCC §§ 9-102(a)(20) and Comment 5(a), 9-702.

4. *Leasing*

   - *In re WorldCom, Inc.*, 339 B.R. 56, 58 UCC Rep Serv 2d 913 (Bankr. S.D.N.Y. 2006) – A "lease" did not fit within the bright-line test for when a "lease" constitutes a "security interest" rather than a true lease under revised UCC § 1-203(b). The court could still evaluate all the facts and circumstances of the transaction under UCC § 1-203(a) to determine whether the lessor had retained a meaningful reversionary interest in the goods and the transaction was therefore a true lease. The court noted that the leased goods were a fungible part of a much larger pool of nearly identical, unmarked equipment and thus it was unlikely that the lessor would be able to identify and

take the goods back at the end of the "lease." The court held that the "lease" created a "security interest." *See also* Comment 3(b) to UCC § 9-102.

- *In re United Air Lines, Inc.*, 447 F.3d 504 (7th Cir. 2006) – Following a recent similar decision involving the same airline, the court held that an airline's lease of real estate was a security arrangement because the rent was for the period of related bonds, and rent was based on the bond repayment schedule, not the value of the leased property. There was a balloon payment of rent which is not typical for a lease, and the lessor had no interest in the property at the end of lease term.

5. *Sales*

- *In re Utah Aircraft Alliance*, 342 B.R. 327 (10th Cir. BAP 2006) – A seller's retention of title to an aircraft was limited in effect to retention of a security interest even though the seller retained possession of the aircraft. The security interest must be perfected by the methods required in the Federal Aviation Act (which pre-empt the perfection requirements of Article 9). UCC § 9-109(c) and Comment 8. The seller was not perfected.

- *In re Cooper Manufacturing Corp.,* 344 B.R. 496, 60 UCC Rep Serv 2d 143 (Bankr. SD Tex. 2006) – An outright assignment of a letter of credit was held not to create a "security interest" because there was no indication of the intent to create a security interest in the letter of credit.

- *In re Wagers*, 340 B.R. 391 (Bankr. D. Kan. 2006) – A debtor paid a prepetition retainer for postpetition legal services by a transfer of cash and future tax refunds to the law firm. Although the debtor retained a reversionary interest in any left-over deposit, there was no "security interest" and the assets were not property of the debtor's bankruptcy estate.

  Comment: At least one court has refused to follow *Wagers*, noting that it was "unpersuaded" by the reasoning of the decision. *See In re Hill*, 2006 Bankr. LEXIS 3295 (Bankr. D. Ore. 2006).

- *Meade v. Richardson Fuel, Inc.*, 166 S.W.3d 55, 58 UCC Rep Serv 2d 501 (Ky. App. 2005) – A seller attempted to retain title to goods until the buyer had paid the purchase price in full. The seller had no more than a security interest in the goods. UCC §§ 1-201(37), revised 1-301, 2-401(1).

- *Fodale v. Waste Management of Michigan, Inc.*, 718 N.W.2d 827, 271 Mich. App. 11, 59 UCC Rep Serv 2d 853 (Mi. App. 2006) – A secured party's option to purchase a debtor's interest in a redemption agreement for a set price upon the debtor's default was a "security interest" governed by Article 9. It constituted an invalid pre-default waiver of the debtor's right to notification of disposition, the right to a commercially reasonable sale, and the right to any surplus.

6. *Intellectual Property*

   - *Advance Magazine Publishers Inc., v. Leach*, 2006 U.S. Dist. LEXIS 93884 (D. Md. 2006) – A person may not obtain property rights in a copyright by adverse possession because federal copyright law pre-empts state law claims.

     Comment: The decision in consistent with *Peregrine* and other cases, which have concluded that the Copyright Act pre-empts Article 9's filing requirements with respect to registered copyrights.

7. *Tort Claims*

   - *Border State Bank v. Edgar*, 2006 WL 2729475 (Minn. App. 2006) – A security agreement described collateral as "settlement on ADM lawsuit." As a matter of contract interpretation, the court held that the description did not cover the lawsuit itself prior to its settlement. *See generally* UCC § 9-108(a), (e); *see also* Comment 3 to UCC § 9-108 and Comment 3 to UCC § 9-703.

   - *Shirley Medical Clinic, P.C. v. U.S.*, 446 F.Supp.2d 1028, 60 UCC Rep Serv 2d 1033 (S.D.Ia. 2006) – A claim for breach of fiduciary duty is a "commercial tort claim." UCC § 9-108(e)(1) requires greater specificity when describing a commercial tort claim than describing it by type or category or another means of general description permitted by UCC § 9-108(a) and (b) for most types of collateral. *See also* Comment 5 to UCC § 9-108. Accordingly, the description "proceeds

from any lawsuit due or pending" was not sufficient to describe a commercial tort claim.

Comment: There is also a special rule for commercial tort claims as after-acquired collateral. UCC § 9-204(b)(2) provides that an after-acquired property clause in a security agreement will not reach future tort claims. As a matter of practice, the security agreement should contain an obligation of the debtor to notify the secured party if a post-closing commercial tort claims arises and to cooperate with the secured party in taking the steps necessary for the attachment and perfection of a security interest in the claim.

B. Security Agreement and Attachment of Security Interest

- *Compass Bank v. Kone*, 134 P.3d 500, 2006 Colo. App. LEXIS 26 (Colo. App. 2006) – A security interest attached to collateral even though the security agreement did not contain a collateral description. The court combined the security agreement with the financing statement – which did have a collateral description – and viewed them as a single, authenticated agreement.

  Comment: Although the composite document rule has long been recognized, it is not advisable to rely on it.

- *In re Sabol*, 337 B.R. 195, 58 UCC Rep Serv 2d 755 (Bankr. C.D. Ill. 2006) – The composite document rule was not satisfied by a loan application that described the collateral, the debtor's authenticated authorization to file a financing statement, a promissory note indicating the existence of collateral, and the financing statement. The description in the loan application was added by the lender after the debtor signed it. The financing statement was filed two weeks after the loan was made, and the debtor may never have seen it.

- *Dickason v. Marine National Bank of Naples, N.A.*, 898 So.2d 1170, 57 UCC Rep Serv 2d 127 (Fl.App.2d 2005) – A security agreement may incorporate several documents to create the security agreement, including the collateral description. A promissory note that stated "this note is secured by. . . UCC-1 financing statements on. . . all business assets" of the borrower sufficiently referred to the collateral described in the financing statements as part of the collateral description in the security agreement.

Comment: Whether a security agreement (composed of a single document or, based on the composite document rule, a number of related documents) described collateral is a question of contract interpretation and ascertaining whether the parties came to an agreement as to the collateral. Contrast this with the public notice function of the collateral indication required in a financing statement, which must be sufficient to put a searcher on notice and therefore cannot rely solely on references to another document.

- *Wells Fargo Bank Minnesota, N.A. v. Robex, Inc.*, 711 N.W.2d 732 (Iowa Ct. App. 2006) – A newly-formed corporate borrower was estopped from claiming that it lacked sufficient rights in property offered as collateral. The debtor had provided the secured party with a written representation that it did have such rights. Thus, a security interest attached to the property that the corporation claimed to own.

  Comment: This decision is consistent with earlier case law, including *In re Pubs, Inc. of Champaign*, 618 F.2d 432, 28 UCC Rep Serv 297 (7th Cir. 1980) (corporation was estopped to deny attachment of security interest in assets that its shareholders had transferred to the corporation and then granted a security interest in to secure the personal debts of the shareholders).

- *In re SHC, Inc.*, 329 B.R. 438, 58 UCC Rep Serv 2d 572 (Bankr. D.De. 2005) – A security interest did not attach to a debtor's tax refund claim because the debtor had previously assigned its rights to the refund and no longer had rights(or the power to grant rights) in the collateral. UCC § 9-203(a).

- *Commercial Credit Counseling Services, Inc. v. W.W. Grainger, Inc.*, 840 N.E.2d 843 (Ind. App. 2006) – One of the elements for the attachment of a security interest is that "value" has been given. UCC §9-203(b)(1). The court incorrectly held that the UCC did not have a definition of "value." See UCC §§ 1-201(44), revised 1-204, 9-102(b). The court borrowed the Uniform Fraudulent Transfer Act's definition of "value." The court incorrectly concluded that no security interest attached because an unperformed contractual promise is not "value" under the UFTA.

  Comment: As defined for purposes of Article 9, "value" includes any consideration sufficient to support a simple contract.

- *Eureka VIII LLC v. Niagara Falls Holdings LLC*, 899 A.2d 95, 2006 WL 1579712 (Del. Sup. Ct. 2006) – An LLC member breached the LLC agreement by allowing a secured creditor to gain voting control over the membership interest in violation of a term of the LLC agreement. The secured creditor succeeded only to the member's passive economic rights.

  Comment: This result is consistent with UCC § 9-408, which permits the attachment, creation and perfection of a security interest in a general intangible (but not the enforcement of that security interest) in the face of an anti-assignment provision, and provides that the account debtor (*i.e.* the LLC) need not recognize the rights of the secured party, and UCC § 9-406, which generally requires an account debtor to recognize the secured party's rights to payments in respect of collateral consisting of a payment obligation. Delaware has enacted non-uniform versions of UCC §§ 9-406 and 9-408, as well as adding related provisions to its LLC and other entity statutes.

- *In re Rebecca A. Knight, M.D., S.C.*, 2006 WL 3147714 (Bankr. C.D. Ill. 2006) – A corporate debtor's president signed a security agreement "individually" as indicated by a notation on the signature line. This did not render the attempted authentication on behalf of the corporation ineffective nor prevent attachment of a security interest to the corporation's property.

C. Description of Collateral and the Secured Debt — Security Agreements and Financing Statements

- *Shirley Medical Clinic, P.C. v. U.S.*, 446 F. Supp. 2d 1028 (S.D. Iowa 2006) – (*See* discussion in section I.A.7.)

D. Perfection

1. Possession, Control, and Other Non-Filing Perfection Methods

- *Heyer v. Conesus Milk Producers Coop. Association*, 341 .B.R. 137, 59 UCC Rep Serv 2d 341 (Bankr. W.D.N.Y 2006) – A secured party had a security interest in collateral that had not been perfected by the filing of a financing statement. An auctioneer had possession of and then sold the collateral. The auctioneer had been notified of the secured party's security interest in the collateral. That was not enough

to make the auctioneer a third party whose possession is possession by the secured party for purposes of perfection by possession in the absence of an authenticated record from the person in possession "acknowledging that it holds possession of the collateral for the secured party's benefit". UCC § 9-313(c)(1). The auctioneer later sent a check representing the proceeds of the sale to the secured party. The court held that the auctioneer's signature on the check served as the necessary acknowledgement.

Comment: It would seem that the auctioneer no longer had possession of the auctioned goods once it sent the check, so that the acknowledgement was of no value at that time.

- *Meoli v. Citicorp Trust Bank*, 444 F.3d 524 (6th Cir. 2006) – A security interest in a mobile home affixed to a foundation was perfected because the secured party followed perfection rules for affixed mobile homes set forth in the Michigan Mobile Home Commission Act.

- *In re Consolidated Freightways Corp.*, 443 F.3d 1160 (9th Cir. 2006) – The court declined to create a federal common law trust to protect freight payments.

- *Rogan v. Bank One (In re Cook)*, 457 F.3d 561, 60 UCC Rep Serv 2d 923 (6th Cir. 2006) – The court properly rejected a bankruptcy trustee's argument that the assignee holder of a mortgage note did not have a perfected lien on the mortgaged real property because the assignee had not recorded an assignment of the mortgage. Under Article 9, a security interest that had attached and was perfected with respect to the note automatically attached and was perfected with respect to the collateral for the note (in this case the mortgage on the real property). UCC §§ 9-203(g), 9-308(e). The court also held correctly that the holder's post-petition recordation of the mortgage assignment did not violate the automatic stay, as the assignment of the mortgage did not affect any interest of the debtor. The court implicitly overruled, but did not mention, *In re Maryville Savings & Loan Corp.*, 743 F.2d 413 (6th Cir. 1984), which had indicated that a mortgage loan could somehow be divided, with one party holding a perfected interest by possession of the note and a different party holding a perfected interest in the mortgage by recordation of an assignment

of the mortgage. *Maryville* is expressly rejected by Article 9. *See* UCC § 9-109, Comment 7.

- *In re Verus Investment Management, LLC*, 344 B.R. 536, 60 UCC Rep Serv 2d 60 (Bankr. N.D. Ohio 2006) – A certificate of deposit that is represented by a physical certificate can be a "deposit account" or an "instrument." UCC §§ 9-102(a)(29), 9-102(a)(47), Comment 12. A security interest in a deposit account as original collateral can be perfected only by control. UCC §§ 9-312(b)(1), 9-314. A security interest in an instrument can be perfected only by possession or the filing of a financing statement. UCC §§ 9-312(a), 9-313(a). The CD involved here was a "deposit account" and not an "instrument." The initial secured party was the depositary bank and therefore had "automatic" control. UCC § 9-104(a)(1). The court further held that when the secured party assigned its security interest to a third party, the assignee remained perfected under UCC § 9-310(c).

  Comment: The court's holding on continued perfection of the security interest following the assignment is incorrect. UCC § 9-310(c) provides only that an assignee of a security interest perfected by the filing of a financing statement does not have to file an assignment of the financing statement to remain perfected. *See* UCC § 9-310(c), Comment 4. The assignee secured party should have been required to establish control by a means permitted by UCC § 9-104 (*e.g.* by entering into a control agreement with the assignor depositary bank) in order to perfect its security interest in the deposit account.

- *In re Fewell,* 352 B.R. 98 (Bankr. E.D. Ark. 2006) – A depository bank perfected its security interest in a deposit account maintained at the secured party by "automatic" control. UCC § 9-104. The secured party assigned the security interest and the assignee remained perfected under UCC § 9-310(c).

  Comment: The court cites the incorrect *Verus* decision as precedent.

- *Counceller v. Ecenbarger, Inc.*, 834 N.E.2d 1018, 59 UCC Rep Serv 2d 524 (Ind.App. 2005) – A secured party did not perfect its security interest in a deposit account by the filing of a financing statement.

- *In re Timothy Dean Restaurant & Bar*, 342 B.R. 1, 59 UCC Rep Serv 2d 485 (Bankr. D.D.C. 2006) – A lessor in possession of a security de-

posit given by its lessee had a perfected security interest in the security deposit because it possessed the "security deposit money" when the lessor deposited the funds in its own bank account, the bank account itself was identifiable cash "proceeds" of the security deposit. The lessor had priority over a secured party that had a security interest in collateral, which did not include the security deposit, and proceeds of that collateral.

Comment: While the result is right, it is not likely that the lessor in fact had possession of "money" (*i.e.* legal tender). The lender had a perfected security interest in money in the lessor's own bank account since that met the requirements for control under UCC § 9-104(a)(3). The security interest in the deposit account perfected by control would have priority over a security interest in the deposit account claimed as proceeds of other collateral. UCC § 9-327(1).

- *City National Bank of Florida v. Morgan Stanley DW, Inc.*, 2006 WL 1582074 (S.D.N.Y. 2006) – A secured party perfected a security interest in a securities account by entering into a control agreement with the securities intermediary. UCC §§ 8-106, 9-106(a). The securities intermediary allowed its customer (the debtor) to transfer funds out of the securities account despite the lack of written authorization from the secured party, which the control agreement required. Nevertheless, the securities intermediary might not be liable because the secured party failed to object within ten days of receiving an account statement that disclosed the transfer.

- *United Hudson Bank v. PNC Bank New England*, 2006 WL 337061, 58 UCC Rep Serv 2d 984 (Ct. Super. 2006) – A debtor held a security entitlement. An agreement between the secured party and the intermediary that was not signed by the debtor did not constitute a control agreement, and the secured party was not perfected. UCC §§ 8-106, 9-106(a).

  Comment: UCC § 8-106(d)(2) provides that the secured party has control of a security entitlement if "the securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser, without further consent of the debtor" so the debtor's signature was not required. However, the securities intermediary may not enter into the control agreement without the consent of the

entitlement holder. UCC § 8-106(e). Contrast with UCC § 9-104(a)(2) which requires an agreement among the debtor, secured party and depositary bank in order to create control with respect to a deposit account pursuant to a control agreement.

- *Commercial Casualty Insurance Co. of Georgia v. United States*, 71 Fed.Cl. 104 (Fed. Cl. 2006) – A payment bond surety that paid subcontractors was subrogated to the rights of both the paid subcontractors and the general contractor. It thus had privity of contract to pursue a claim against the government on the general contract and sovereign immunity did not bar to the claim.

  Comment: *See also Liberty Mutual Insurance Co. v. United States*, 70 Fed. Cl. 37 (Fed. Cl. 2006); *Nova Casualty Co. v. United States*, 69 Fed. Cl. 284 (Fed. Cl. 2006).

- *In re O'Neill*, 344 B.R. 142 (Bankr. D. Colo. 2006) – The perfection of a security interest in a motor vehicle through compliance with the state's certificate of title statute is the equivalent of perfection by filing. UCC § 9-311. Thus, the issuance of the certificate of title after the debtor filed for bankruptcy, but within 20 days of the attachment of the security interest, related back to the time of attachment under UCC § 9-317(e). The security interest was therefore protected from avoidance by Bankruptcy Code § 546(b).

- *In re Jackson*, 2006 WL 3064087 (Bankr. N.D. Ohio 2006) – A seller of a used car delayed in obtaining perfection by having itself noted as the "secured party" on the certificate of title. The seller was instead still listed as the "owner" on the certificate of title. The seller surrendered the C.O.T. when a new certificate was issued that identified the buyer as owner and the seller as secured party. The seller was not perfected during the period that it was still shown as the owner.

- *In re Global Environmental Services Group, LLC*, 59 UCC Rep Serv 2d 655 (Bankr. D. Haw. 2006) – A seller of motor vehicles retained a security interest in the cars, maintained possession of the certificates of title, and never had the cars re-titled in the buyer's (debtor's) name. The seller was unperfected.

- *In re Troupe*, 340 B.R. 86, 59 UCC Rep Serv 2d 23 (Bankr. W.D.Okla. 2006) – A buyer certified at the time of its purchase of a tractor that it would use the tractor for personal, family, or household purposes. The seller relied on the automatic perfection rules applicable to purchase money security interests in consumer goods. The consumer later used the goods for business purposes, but the seller remained perfected. UCC §§ 9-309(1), 9-310(b)(2).

- *In re Lance*, 2006 WL 1586745, 59 UCC Rep Serv 2d 632 (Bankr. W.D. Mo. 2006) – A snowmobile was not a "vehicle" that required registration under a state certificate of title law. It was consumer goods and the purchase money security interest was automatically perfected. UCC §§ 9-309(1), 9-310(b)(2), 9-311.

- *In re Dalton*, 336 B.R. 600, 58 UCC Rep Serv 2d 213 (Bankr. 10th Cir. 2005) – A motor vehicle owned by a person who was a member of the Cherokee Nation was not subject to the state's certificate of title law. Accordingly, the exclusion from the need to file a financing statement to perfect a security interest did not apply. UCC § 9-311(b).

2. *Preparation of Financing Statement*

   - *Cohen v. KB Mezzanine Fund II*, 432 F.3d 448 (3d Cir. 2006) – Under former Article 9, the reference in a financing statement to the secured party as the "collateral agent" for other lenders, without naming the other lenders, satisfied the requirement that the financing statement include the name of the "secured party."

     Comment: The court noted that this is the express rule under Article 9. UCC §§ 9-102(a)(72)(E), 9-503(d).

   - *Pankratz Implement Company v. Citizens National Bank*, 130 P.3d 57, 59 UCC Rep Serv 2d 53 (Kan. Sup. Ct. 2006) – The misstatement of an individual debtor's first name on a financing statement as "Roger" instead of the correct "Rodger" meant that the financing statement was not sufficient and did not perfect the security interest. The financing statement would not be found under a search using "Rodger" and the filing office's "standard" search logic. UCC § 9-506(a), (c).

- *Corona Fruits & Veggies, Inc., v. Frozsun Foods, Inc.*, 143 Cal. App. 4th 319, 48 Cal. Rptr. 3d 868 (Cal. Ct. App. 2006) – The debtor's name was "Armando Munoz Juarez." The financing statements provided the name as "Armando Munoz." The court found the name seriously misleading. The court rejected an argument that Latin American naming conventions controlled the name requirement.

  Comment: As between the filer and the searcher, the burden is on the filer to get it right. On a cost-benefit basis, this puts the burden on one person – the filer knows that it has to get the debtor's name right and better do it right. If Article 9 put the burden on searchers to come up with alternatives, then every searcher would have to engage in that activity, and it would not be very efficient. A filer's burden is especially high, though, with respect to individual debtors, because individuals do not have official legal names that maybe verified in the public record. Prudent filers will conduct due diligence as to name variations used by the debtor and obtain copies of legal documents bearing the individual's name, filing in each possible variation.

- *Host America Corp. v. Coastline Financial, Inc.*, 60 UCC Rep Serv 2d 120 (D. Utah. 2006) – Filing against "K W M Electronics Corporation" was inadequate against "K.W.M. Electronics Corporation" because the standard search logic used by the filing office did not compensate for any errors, even the absence of periods. UCC § 9-506(a), (c).

- *In re Berry,* 2006 WL 2795507 (Bankr. D. Kan. 2006) – Filing against "Mike Berry" ineffective where debtor's full legal name was "Michael R. Berry, Jr." UCC § 9-506(a), (c).

- *In re Stewart*, 2006 WL 3193374 (Bankr. D. Kan. 2006) – A financing statement that identified the debtor as "Richard Stewart" was ineffective because the debtor's legal name was "Richard Morgan Stewart IV" and a search under the debtor's legal name did not uncover the filing. UCC § 9-506(a), (c).

- *In re Borden*, 353 B.R. 886 (Bankr. D. Neb. 2006) – The filing of a financing statement against "Michael R. Borden" that identified him as "Mike Borden" was seriously misleading because a search using

the standard search logic and the longer first name (Michael) did not locate the financing statement. UCC § 9-506(a), (c). The court did not specify whether Michel Borden, Michael R. Borden or Michael [full middle name] Borden would have been the acceptable debtor name or whether in the second alternative, the period would have been required after the "R".

- *In re Tyringham Holdings, Inc. (The Official Committee of Unsecured Creditors for Tyringham Holdings, Inc. v. Suna Bros. Inc.)* 354 B.R. 363 (Bankr. E.D. Va. 2006) – A financing statement listed the debtor's name as "Tyringham Holdings". The debtor was a Virginia corporation listed on the Secretary of State's records as "Tyringham Holdings Inc." An official UCC search using the filing office's standard search logic under the name "Tyringham Holdings Inc." did not pick up the financing statement. Therefore, the financing statement was seriously misleading and insufficient to perfect the security interest. UCC § 9-506(a), (c).

  Comment: The IACA Guidelines indicate that ending "noise words" (such as "Inc.," "Co." or "Corp.") will be disregard by standard search logic, but that may not be the case in a specific state if that state does not sue the IACA model search logic.

- *In re Global Environmental Services Group, LLC*, 2006 WL 980582, 59 UCC Rep Serv 2d 655 (Bankr. D.Haw. 2006) – A debtor was named "Global Environmental Services Group, LLC." The financing statement identified the debtor as "Global Environmental Group, LLC." The financing statement was insufficient to perfect a security interest due to the omission of the word "Services" in the debtor's name UCC § 9-506(a), (c). The secured party's possession of certificates of title was insufficient to perfect a security interest.

3. *Filing of Financing Statement — Manner and Location, Lapse, Changes*

- *In re Aliquippa Machine Co.*, 343 B.R. 145, 59 UCC Rep Serv 2d 773 (Bankr. W.D. Pa. 2006) – UCC § 9-509(b)(1)'s authorization to file an "initial financing statement" upon authentication of a security agreement also authorizes the secured party to file a second "initial" financing statement after the first financing statement lapsed.

- *In re Aura Systems, Inc.,* 347 B.R. 720 (Bankr. C.D. Cal. 2006) – A state judgment lien statute that allowed creation of a judgment lien by a filing in the UCC records if a security interest could be perfected by a filing in that office did not create a judgment lien where the debtor was not "located" in that state. UCC §§ 9-301 *et seq.*

E. Priority

1. Priority — Set-Off, Claims of Unsecured Third Parties, Buyers, and Rights of Holders of Non-UCC Liens

- *Frazier Nuts Inc. v. America Ag Credit*, 141 Cal. App. 4th 1263, 46 Cal. Rptr. 3d 869 (Cal.Ct.App. 2006) – A supplier with a statutory lien on farm products has priority in proceeds under a "jural correlative" to the priority of the lien in the products themselves, even though the statute creating the statutory lien did not expressly provide for a lien on proceeds.

- *Integrity Bank Plus v. Talking Sales, Inc.*, 2006 WL 212193 (D. Minn. 2006) – A buyer purchased farm equipment, never took delivery, and immediately consigned the equipment back to the seller. The seller had never acted as a consignor before. The buyer was not a buyer in ordinary course of business that would take free of a security interest created by the buyer's seller. UCC §§ 1-201(9), revised 1-201(a)(9), 9-320. The court held that the buyer's secured party was negligent in not conducting a UCC search and owed a duty of reasonable care to the seller's secured party to make such a search.

- *DaimlerChrysler Services North America, LLC v. Labate Chrysler, Jeep, Dodge, Inc.*, 2006 WL 2792160 (N.D. Ohio 2006) – A debtor cannot buy inventory free of a security interest by selling the inventory to itself as a buyer in ordinary course of business because the buyer knew that the sale violated the rights of the secured party. UCC §§ 1-201(9), revised 1-201(a)(9), 9-320.

- *Bombardier Capital, Inc. v. Hensley*, 2006 WL 2709212, 60 UCC Rep Serv 2d 1357 (Ky. Ct. App. 2006) – A buyer of a mobile home for $53,000 paid only $18,000 because of the seller's failure to install an air conditioner and perform other promises under the sales agreement. The buyer could qualify as a buyer in ordinary course of

business who took free of a security interest created by the seller. UCC §§ 1-201(9), revised 1-201(a)(9), 9-320.

- *Ronald v. Odette Family Ltd. Partnership v. AGCO Finance, LLC*, 35 Kan. App. 2d 1, 123 P.3d 212, 58 UCC Rep Serv 2d 206 (Kan. App. 2005) – A buyer not in ordinary course of business took goods subject to a security interest granted by the buyer's seller. UCC § 9-320.

- *Walden v. Mercedes Benz Credit Corp.*, 2005 WL 995217, 57 UCC Rep Serv 2d 182 (Pa. Com. Pl. 2005) – A buyer in ordinary course of business took free of a security interest created by its immediate seller, but not by an earlier transferor. UCC § 9-320.

- *Pinnacle Bank v. Darland Construction Co.*, 709 N.W.2d 635 (Neb. 2006) – A creditor of a debtor garnished an account debtor of the debtor. The account debtor paid the obligation into court. A secured party with a security interest in the debtor's accounts objected, but the objection was overruled. The court later disbursed the money to the garnishing creditor. The secured party then sought the money from the garnishing creditor, but the court ruled that money, unlike goods, was not generally subject to that remedy.

- *Novartis Animal Health US, Inc. v. Earle Palmer Brown, LLC* , 424 F. Supp. 2d 1358, 59 UCC Rep Serv 2d 270 (N.D. Ga. 2006) – An account debtor, who pre-paid the account and had a right to the return of the money from its creditor due to the creditor's breach of its agreement, could not obtain an affirmative recovery from an assignee of the account. UCC §§ 9-402, 9-404(b). The account debtor could only reduce the obligation owed by its damages. UCC § 9-404.

- *In re Huber Contracting, Inc.*, 347 B.R. 205, 60 UCC Rep Serv 2d 804 (Bankr. W.D. Tex. 2006) – A depositary's security interest in a general contractor's deposit account had priority over subcontractor's statutory lien on the deposited funds. UCC § 9-327.

- *R.C. Moore, Inc. v. Les-Care Kitchens Inc.*, 2006 WL 2590064 (Me. Super. Ct. 2006) – A garnishee depositary bank waived its security interest in the deposit account by failing to assert that interest and by allowing the debtor to withdraw funds after the bank received the garnishment.

- *Wells Fargo Bank Minnesota v. B.C.B.U., Inc.*, 143 Cal. App. 4th 493, 49 Cal. Rptr. 3d 324 (Cal. App. 2006) – A waiver of defenses clause was enforceable and the lessee was obligated to the finance lessor's assignee pursuant to UCC § 9-403. UCC § 9-403, not UCC § 2A-407, was applicable because the lease had been assigned.

  Comment: A lessee is an "account debtor" for purposes of Part 4 of Article 9. UCC § 9-102(a)(3) and Comment 5(h).

- *Keybank, N.A. v. DPR Construction, Inc.*, 209 Or. App. 435, 149 P.3d 233 (Or. Ct. App. 2006) – An assignee of an account sent payment instructions to the account debtor. The account debtor was justified in paying the debtor (assignor) because the notice did not arrive at the account debtor's location, even though it had arrived at the address designated in the agreement between the debtor and the account debtor as the place to send notifications. UCC § 9-405(a) requires that an account debtor have "*received* a notification" (emphasis added) of the assignment before it is obligated to pay the assignee. Whether and when an organization has "received" notice is governed by Article 1. UCC §§ 1-201(27), revised 1-202.

  Comment: Article 1 provides that a notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and in any event from the time it would have been brought to the individual's attention if the organization had exercised due diligence. One would think that using the notice address in the contract would be sufficient.

- *American Investment Financial v. United States*, 98 A.F.T.R.2d 2006-8171 (10th Cir. 2006) – A secured party's security interest in a medical provider's contracts with insurers did not have priority over a federal tax lien in the receivables due to the provider from the insurers for services rendered by the provider more than 45 days after notice of the federal tax lien was filed.

- *Fifth Third Bank v. United States*, No. 1:06-CV-117, 2006 U.S. Dist. LEXIS 92741 (S.D. Oh. 2006) – A person objecting to a levy of the federal tax lien must do so within nine months after the levy was issued.

- *WSFS v. Chillibilly's, Inc.*, 2005 WL 730060, 57 UCC Rep Serv 2d 692 (De. Super. 2005) – A lessor of real property had priority under its lease in fixtures over the claims of a secured party who had a later perfected security interest and took no action to obtain the agreement of the lessor as to the priority of the security interest. UCC § 9-334.

- *Feliciana Bank & Trust v. Manuel & Sessions, L.L.C*, 943 So.2d 736 (Miss. Ct. App. 2006) – A lender with a properly recorded deed of trust on real property had priority over a buyer of timber. UCC §§ 2-107(3), 9-334.

- *Charter One Auto Finance v. Inkas Coffee Distributors Realty*, 39 Conn. L. Rptr. 110, 57 UCC Rep Serv 2d 672 (Conn. Super. 2005) – A storage company in possession of a car had a common-law lien on the car for the storage fees. That lien had priority over a previously perfected security interest. UCC § 9-333.

- *Hintz & Reiman Inc. v. J&J Produce*, 05 civ. 5739, 2006 WL 709106 (S.D.N.Y. 2006) – A seller that desires to use the benefits of the Perishable Agricultural Commodities Act, 7 USC §§ 499a *et seq.* ("PACA"), must include a certain notice on the face of its invoices. A seller that included that notice on the back of the invoices did not satisfy the statute.

- *"R" Best Produce, Inc. v. Shulman-Rabin Marketing Corp.,* 467 F.3d 238 (2d Cir. 2006) – A carrier could not receive payment out of a PACA trust for the charges associated with transporting the produce to the debtor.

  Comment: See also Pacific International Marketing, Inc. v. A & B Produce, Inc., 462 F.3d 279 (3d Cir. 2006) (same).

- *Keybank National Association v. Ruiz Food Products, Inc.*, 2005 WL 2218441, 59 UCC Rep Serv 2d 870 (D.Id. 2005) – A debtor that created a new entity and a new deposit account for the express purpose of cleansing a secured party's security interest from funds in a different deposit account could transfer clear "title" to the funds in the account to innocent transferees. UCC § 9-332.

- *General Electric Capital Corp. v. Union Planters Bank, N.A.*, 409 F.3d 1049, 58 UCC Rep Serv 2d 46 (8th Cir. 2005) – The court held that a comment to former UCC § 9-306 had the force of law. Transfers in the ordinary course of cash were free of a security interest in that cash as proceeds of other collateral. Former UCC § 9-306, Comment 2.c.

2. *Priority — Competing Security Interests*

- *First National Bank in Munday v. Lubbock Feeders, L.P.*, 183 SW 3d 875 (Tx. Ct. App. 2006) – A secured party had a blanket security interest. Another secured party claimed a PMSI in the debtor's cattle. The cattle were first delivered to the debtor, the loan was made, and then the seller was paid. The court held it was a PMSI, even though it could not trace the loaned money exactly to the cattle purchase. The court held that the payments were "closely allied" with the purchase. The court held that advances made as much as 18 days after debtor's purchase were "closely allied" with the purchase because they could be traced to the purchase (in some unspecified manner). The notification requirement of UCC § 9-324(d) is triggered by the debtor's actual possession and thus never applies if the PMSI secured party has possession.

- *Fin Ag, Inc. v. Hufnagle, Inc.*, 720 N.W.2d 579, 60 UCC Rep Serv 2d 629 (Minn. 2006) – Under the Food Security Act, a buyer of farm products takes free of a security interest created by the seller, but not a security interest created by a prior owner of the collateral. *Compare* UCC §§ 9-315(a)(1), 9-320.

- *In re Commercial Money Center, Inc.*, 350 B.R. 465, 60 UCC Rep Serv 2d 584 (BAP 9th Cir. 2006) – The court held that payment streams under leases can be separated from the chattel paper, and then constitute payment intangibles. The court also held that under the facts of this case, the "payment intangibles" were not "sold" and instead the "seller" had borrowed money from the "buyer" (collateralized by the payment intangibles) because the seller retained (through its reimbursement obligations under a surety bond that covered the payment of the payment intangibles) full recourse for defaults by the lessees. So, because the transaction was not a "sale," the "buyer" did

not get the benefit of automatic perfection that applies to true buyers of payment intangibles and had failed to perfect its security interest.

Comment: A true buyer of payment intangibles arising from chattel paper, which is relying on automatic perfection, should not rest on its laurels. Another secured party that takes possession of the chattel paper will generally have a "superpriority" in the chattel paper. UCC §§ 9-330(a) and (b). As such, it will also have a superpriority in the cash proceeds of the chattel paper. UCC §§ 9-330(c)(1) and 9-322(c)(2). The payments under the payment intangibles would normally be cash proceeds of the chattel paper. UCC § 9-102(a)(9). Thus, the secured party in possession of the chattel paper generally would have priority in the collections over the buyer of the payment intangibles (not in possession of the related chattel paper). UCC § 9-318 Comment 4 points out that in limited circumstances the seller has the "power" to transfer rights that it does not have (this being one of those limited circumstances). *See also* UCC § 9-203(b)(3) and Comment 6.

- *Nebraska Beef Ltd. v. KBF Financial, Inc.*, 2006 WL 538790 (N.D. Tex. 2006) – Account debtors incorrectly paid a senior secured party instead of the junior secured party. The senior secured party was allowed to retain the funds.

4. Proceeds

- *Madisonville State Bank, N.A. v. Citizens Bank of Texas, N.A.*, 184 S.W.3d 835 (Tex. Ct. App. 2006) – A secured party had a security interest in accounts. Collections from the accounts were deposited into a deposit account. The court held that the collections were not "identifiable proceeds" of the accounts despite evidence that $1.3 million of the $5.3 million deposited during the relevant period was derived from the accounts.

  Comment: A security interest generally attaches to any identifiable proceeds of collateral. UCC § 9-315(a)(2). Proceeds that are commingled with other property are identifiable proceeds to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than Article 9 with respect to

commingled property of the type involved. UCC § 9-315(b) and Comment 3. The "lowest intermediate balance" tracing rule should have been available.

5. *Purchase-Money Security Interests*

   - *In re Master Services, Inc.*, 2006 WL 770494 (8th Cir. 2006) – A financing seller did not have PMSI priority in equipment over a prior secured party pursuant to UCC § 9-324(a) because the seller filed its financing statement more than 20 days after the goods were delivered to the debtor, installed, and operational.

   - *In re Murray*, 352 B.R. 340 (Bankr. M.D. Ga. 2006) – Obligations incurred in connection with the purchase of a motor vehicle for documentary fee, certificate of title fee, and an extended service contract were all part of the "price" of the goods and the secured party's PMSI priority included those obligations.

   - *In re White*, 352 B.R. 633 (Bankr. E.D. La. 2006) – Obligations incurred in connection with the purchase of a motor vehicle for sales tax and fees were part of the "price" and thus the secured party's PMSI priority included those obligations. Obligations for an extended warranty and for gap insurance coverage were not part of the price of the vehicle and those obligations did not have the benefit of PMSI priority.

   - *Lewiston State Bank v. Greenline Equipment, L.L.C.*, 147 P.3d 951, 564 Utah Adv. Rep. 16 (Utah Ct. App. 2006) – A secured party had a PMSI. A new creditor provided the funds to pay off the debtor's original PMSI secured party and obtained a release of the security interest. One month later the second secured party provided additional credit and obtained a security interest of its own. That later security interest was not entitled to PMSI priority.

   - *In re Peaslee,* 2006 WL 3759476 (Bankr. W.D.N.Y. 2006) – A debtor had "negative equity" in a car. The debtor traded in the car and part of the amount financed in connection with the purchase of the new car. The negative equity that was financed was not treated as part of the new car's purchase price. New York follows the "transformation rule" (*i.e.* the rule that cross-collateralization or refinancing transforms the security interest into a non-PMSI for PMSIs in consumer

transactions). This left the secured party without a PMSI for purposes of Bankruptcy Code § 1325(a)(5).

Comment: See also, First National Bank in Munday v. Lubbock Feeders, L.P., 183 SW 3d 875 (Tx. Ct. App. 2006); *Fin Ag, Inc. v. Hufnagle, Inc.*, 720 N.W.2d 579, 60 UCC Rep Serv 2d 629 (Minn. 2006).

F. Default and Foreclosure

1. Default and Repossession of Collateral

- *Allen v. First Nat'l Bank of Monterey*, 845 N.E.2d 1082 (Ind. Ct. App. 2006) – A repossession that caused an elderly relative to go next door "to get her gun" was a breach of peace. UCC § 9-609.

- *McMillen v. Drive Financial Services, L.P.*, 2005 WL 1041343, 57 UCC Rep Serv 2d 517 (D. Kan. 2005) – A debtor under a secured transaction remains the owner of the collateral until the secured party has actually sold the collateral or accepted the collateral in satisfaction of the debt (*i.e.* a strict foreclosure). A "repossession title" obtained by the secured party to facilitate a foreclosure sale does not of itself transfer ownership of the collateral to the secured party.

- *Osborne v. Minnesota Recovery Bureau, Inc.*, 2006 WL 1314420, 59 UCC Rep Serv 879 (D.Minn. 2006) – An independent contractor retained by a secured party could itself have liability for violation of the rules of Part Six of Article 9 that apply to "secured parties."

- *Cla-Mil East Holding Corp. v. Medallion Funding Corp.*, 846 N.E.2d 431, 58 UCC Rep Serv 2d 747 (N.Y.App. 2006) – A secured party was not liable for damage negligently caused when a marshal repossessed the collateral.

- *Padin v. Oyster Point Dodge*, 397 F.Supp.2d 712, 59 UCC Rep Serv 2d 553 (E.D.Va. 2005) – A secured party may not repossess collateral prior to default in the absence of an agreement authorizing it to do so. UCC § 9-601(a). In addition, the secured party acted in a commercially unreasonable manner by holding the collateral an unreasonably long time prior to making any disposition. *See* Comment 5 to UCC § 9-620.

2. Retention of the Collateral in Satisfaction of the Debt

- *SPW Associates, LLP v. Anderson*, 718 N.W.2d 580 (N.D. 2006) – One member of a joint venture could grant a security interest in property of the joint venture. As a result, it also had the power to consent to the secured party's acceptance of the collateral in satisfaction of the debt. The secured party did not need to send notification of the proposed acceptance to the other joint venturer. UCC § 9-611.

  Comment: Because the collateral was property of the joint venture, the joint venture was the "debtor" and entitled to the notice. A joint venture is a form of partnership and thus is an entity separate from its partners. Notice to the entity should suffice.

3. *Notice and Commercial Reasonableness of Foreclosure Sale*

- *Hightower v. Watson Quality Ford, Inc.*, 2006 WL 1626587 (N. D. Miss. 2006) – A seller sold chattel paper to a bank without recourse. The court held that the seller was potentially liable for the bank's improper notification of disposition to the obligor on the chattel paper because, under traditional contract principles, an assignor was a surety of the assignee's performance.

  Comment: Any surety obligation should run only to the buyer of the chattel paper.

- *Lister v. Lee-Swofford Investments, L.L.P.*, 195 S.W.3d 746 (Tex. Ct. App. 2006) – A public foreclosure sale of inventory of tractor parts was widely advertised, and circulars describing the auction were mailed to parts dealers. The sale was commercially reasonable despite a low sales price and the absence of parts dealers at the sale because the procedures were commercially reasonable. UCC § 9-627.

- *GMAC v. Honest Air Conditioning & Heating, Inc.*, 933 So. 2d 34 (Fla. Ct. App. 2006) – A secured party conducted a foreclosure sale and received a check from the buyer of the collateral. The check bounced. The secured party took that risk and could not collect the balance due from the debtor.

- *Auto Credit of Nashville v. Wimmer*, 2006 WL 2523979, 60 UCC Rep Serv 2d 1041 (Tenn. Ct. App. 2006) – A secured party sent notification of a proposed disposition of collateral to the debtor 20 days before the sale. UCC §§ 9-611, 9-612. The secured party did not

receive confirmation that the debtor received the notice. The debtor did not receive the notice, of which the post office advised the secured party. The secured party did not act reasonably. The debtor was entitled to statutory damages, which she could set off against her obligation for the deficiency.

- *Panora State Bank v. Dickinson*, 713 N.W.2d 247, 58 UCC Rep Serv 2d 726 (Ia.App. 2006) – A secured party's sending of a notice to the debtor, which was returned by the post office as "unclaimed", was nevertheless sufficient notice. UCC § 9-611.

- *AmSouth Bank v. Trailer Source, Inc.*, 206 S.W.3d 425, 59 UCC Rep Serv 2d 1190 (Tn.App. 2006) – A secured party holding an unperfected security interest was not entitled to notice from a foreclosing secured creditor based on a search of the filing records. UCC §§ 9-610, 9-611. The foreclosing secured creditor did owe a duty to the junior secured party in connection with the foreclosure sale. UCC § 9-610.

- *Greenlee v. Mazda American Credit*, 92 Ark.App. 400, 59 UCC Rep Serv 2d 532 (Ark.App. 2005) – When the question of the commercial reasonableness of a foreclosure sale is put at issue, the secured party has the burden of proof to demonstrate that it acted in a commercially reasonable manner. UCC § 2-626(a)(2). The secured party's witness testified that he did not have personal knowledge of the efforts that went into the advertising of the disposition of the collateral and the secured party failed to carry its burden.

- *Mauna Loa Vacation Ownership, L.P., a Hawaiian limited partnership v. Accelerated Assets, L.L.C., an Arizona limited liability company*, 2005 WL 2410676, 59 UCC Rep Serv 2d 1109 (D.Az. 2005) – The requirements of commercial reasonableness applied to the collection of payments due on collateral where there was a true sale of the notes to a buyer, but the buyer had a right of recourse against the seller. UCC § 9-607(c).

- *Whitney National Bank v. Hebert*, 926 So2d 725, 59 UCC Rep Serv 2d 1010 (La.App.3d 2006) – Article 9 does not require a secured party to give notice to the debtor of the secured party's intent to seek a defi-

ciency judgment prior to the repossession or disposition of the collateral.

- *Wright v. Wells Fargo Auto Finance, Inc.*, 2005 WL 2861501, 59 UCC Rep Serv 2d 8 (Ia. Dist. 2005) – A foreclosure sale was commercially reasonable where the secured party affirmatively established that it had engaged in commercially reasonable efforts to sell the collateral. General statements by the debtor that the collateral was worth more than the amount obtained at the foreclosure sale did not undermine that conclusion.

4. *Effect of Failure to Give Notice, Conduct Commercially Reasonable Foreclosure Sale or Otherwise Comply with Part 6 of Article 9*

   - *Proactive Technologies, Inc. v. Denver Place Associates Ltd. Partnership*, 141 P.3d 959, 60 UCC Rep Serv 2d 546 (Colo. App. 2006) – A debtor could not obtain consequential damages (for lost profits) as a result of the secured party conducting a commercially unreasonable disposition.

   - *Turner v. Firstar Bank, N.A.*, 845 N.E.2d 816 (Ill. Ct. App. 2006) – A secured party caused the debtor's car to be repossessed when the debtor was not in default. Further, the secured party took no action to see that the repo agent returned to the debtor the goods that were in the car. The secured creditor was liable for the agent's actions and inaction. UCC § 9-625.

   - *In re Schwalb,* 347 B.R. 726, 60 UCC Rep Serv 2d 755 (Bankr. D. Nev. 2006) – Debtor pawned two titled vehicles. The signed pawn tickets constituted security agreements and the pawn broker perfected its security interest by noting its lien on the certificates of title. Article 9, including UCC § 9-602's anti-waiver provisions, limited the secured party's foreclosure and contractual forfeiture rights.

     Comment: The court quotes the *Maltese Falcon*, *Pop Goes the Weasel* and *The Economist* in this detailed and entertaining opinion.

   - *McCullough v. Goodrich & Pennington Mortgage Fund, Inc.*, 2006 WL 1432442 (D.S.C. 2006) – A mortgage loan servicer owed no duty of care to mortgage lender's secured party with a security interest in

the mortgage notes. The servicer was not liable for negligent impairment of the collateral.

G. Transition

- *In re Duesterhaus Fertilizer Inc.*, 347 B.R. 646 (Bankr. C.D. Ill. 2006) – A secured party made an "in lieu" filing in a new state that referred to the prior filing (in a different jurisdiction) for a description of the collateral. The "in lieu" filing was ineffective because the first requirement of an "in lieu" filing is that it satisfy the requirements for an initial financing statement, including having an indication of the collateral. UCC § 9-706.

- *See In re Nittolo Land Development Ass'n.*, section I.A.3.

II. REAL PROPERTY SECURED TRANSACTIONS

- *In re Emerald Outdoor Advertising, LLC*, 444 F.3d 1077 (9th Cir. 2006) – The decision reviews the perfection and priority rules for interests in Native American land.

- *Money Store Investment Corp. v. Summers*, 849 N.E.2d 544 (Ind. 2006) – A debt owed to an unsecured creditor did not become secured when the unsecured creditor acquired a senior mortgage with a dragnet clause in an effort to achieve priority over a junior mortgagee.

- *Federal Deposit Ins. Corp. v. Owen*, 88 Conn.App. 806, 873 A.2d 1003, 57 UCC Rep Serv 2d 440 (Conn. App. 2005) – The running of the statute of limitations on a note secured by a mortgage does not prevent the foreclosure of the mortgage itself. The running of the statute of limitations bars the availability of a judicial remedy to collect the note, but does not destroy the existence of the debt.

- *In re Hayes*, 194 Fed.Appx. 217 (5th Cir. 2006) – In a state that had a race-notice real property priority system, a buyer took possession of property but did not record a deed to the property. The buyer's rights as an owner in possession were superior to those of a lender that recorded a mortgage on the property. The lender's title search was not sufficient due diligence, even if that met banking industry standards of diligence.

- *Thomson v. Daisy's Luncheonette Corp.*, 11920/04, 2006 N.Y. Misc. LEXIS 3654 (N.Y.S. Ct. 2006) – An owner of property alleged that she sought a loan and in exchange for the loan gave a deed to her real property to the lender. She alleged that the bargain was that the deed was really a mortgage and that the property would be re-conveyed to her when she had repaid the loan. However, in the absence of any evidence to support those allegations, the court held that the deed was an outright transfer.

- *City of New York v. Breonics Inc.*, 5660/05, 236 N.Y.L.J. 69 (N.Y.S.Ct. 2006) – A contract requiring a seller of land to care for retired police horses violated the rule against perpetuities.

- *Wachovia Bank v. Lifetime Industries, Inc.*, 145 Cal.App.4th 1039, 52 Cal.Rptr.3d 168 (Cal. App. 2006) – A person who holds a recorded option on real property will ordinarily have its title priority date as of the date of the recording of the option. However, where the optionee obtains title through a different transaction, the title does not relate back.

- *In the matter of Merscorp Inc. v. Romaine*, 2006 N.Y. LEXIS 3699 (N.Y 2006) – The court ordered a county recorder to record a mortgage in the name of Mortgage Electronic Registration System (MERS).

III. GUARANTIES

- *Bruno v. Wells Fargo Bank, N.A.*, 850 N.E.2d 940 (Ind. Ct. App. 2000) – A guarantor attempted to revoke a guaranty by mailing a notice. The revocation notice was not mailed by certified mail (as required in the guaranty) and was not valid.

- *Borley Storage and Transfer Co. v. Whitted*, 710 N.W.2d 71, 59 UCC Rep Serv 2d 174 (Neb. 2006) – An unjustifiable impairment of collateral discharges only sureties, not co-makers. Former UCC § 3-606. *See* revised UCC § 3-605(d).

- *Trustmark National Bank v. Barnard*, 930 So. 2d 1281 (Miss. Ct. App. 2006) – A secured party's impairment of collateral does not discharge the maker of the note, only indorsers and accommodation parties.

- *Hightower v. Watson Quality Ford, Inc.*, 2006 WL 1626587 (D. Miss. 2006) – *See* discussion in Section I.F.3.

- *Kilpatrick Bros. Painting v. Chippewa Hills School District*, 2006 WL 664210 (Mich. Ct. App. 2006) – A beneficiary of a performance bond did not discharge the obligor on the bond by hiring, before terminating the bonded contractor, another contractor to correct problems with the work the bonded contractor was supposed to perform.

- *Mercury Cabling Systems LLC v. North American Specialty Insurance, Co.*, 2006 WL 1320489 (Conn. Super. Ct. 2006) – A creditor refused to accept a debtor's tender of less than full payment. That act did not discharge a surety.

- *Boutros v. Minoso*, 944 So.2d 1076 (Fla. Ct. App. 2006) – A guarantor had equitable claims for contribution from a co-guarantor and legal claims as an assignee of the secured party. The equitable claims were unaffected by the guarantor's failure to dispose of the collateral in a commercially reasonable manner.

- *Integrated Marketing and Promotional Solutions Inc. v. JEC Nutrition LLC*, 06 Civ 5640, 2006 U.S. Dist. LEXIS 90114 (S.D.N.Y. 2006) – A corporate agreement included a provision that the principal of the corporate party would

personally guarantee the agreement. The individual signed the agreement in his capacity as the chief executive officer of the corporate party. The court held that it was possible that the signature of the chief executive officer, as the agent of the corporation, also operated as his personal signature with respect to the guarantee, given the brevity of the agreement and the relative conspicuousness of the personal guarantee provision.

- *Centex Construction v. Acstar Insurance Co.*, 448 F.Supp.2d 697 (E.D.Va. 2006) – A surety was subject to increases on a bond where the surety agreement expressly provided for those. The express provision overrode industry custom that performance bonds did not cover increased amounts.

- *The Travelers Indemnity Company v. Ballantine*, 436 F.Supp.2d 707 (M.D.Pa. 2006) – A surety may effectively waive notice of any modifications to the insured agreement that increase the risk to a surety.

- *BankAtlantic v. Berliner*, 912 So.2d 1260, 58 UCC Rep Serv 2d 821 (Fl.App. 4th 2005) – A creditor that filed a satisfaction of judgment against one guarantor did not thereby release claims against the second guarantor.

IV. FRAUDULENT TRANSFERS

- *Pension Transfer Corp. v. Beneficiaries (In re Freuhauf Trailer Corp.)*, 444 F.3d 203 (3d Cir. 2006) – An employer modified its pension plan to increase the payments to key employees to induce them to stay with the employer during a time of financial problems. The increase in effect transferred to the employees a portion of a surplus in the pension plan that otherwise would have gone to the employer. The court held that for purposes of the fraudulent transfer laws the right to the surplus was "property" of the employer and that the increase in the payments to the employees was a "transfer." Before considering the "totality of the circumstances" to evaluate the amount of "value" received by the transferor (the employer) for purposes of determining whether the transferor received "reasonably equivalent" value for fraudulent transfer purposes, the court must consider whether the transferor received "any" value. If there is "some" value, then the court must measure the value given and the value received, including "indirect" and "intangible" value received by the transferor. However, the calculation does not have to be "precise" where it is evident that the benefits are "minimal", as the court held was the case here.

- *In re French*, 440 F.3d 145 (4th Cir.), *cert. denied* 127 S. Ct. 72 (2006) – A fraudulent transfer of real estate in the Bahamas between US parties was subject to US jurisdiction.

  Comment: One court has already criticized this decision. The Circuits are split on the question of whether a bankruptcy trustee's avoidance powers have extraterritorial application. *See Midland Euro Exchange, Inc. v. Swiss Finance Corp.*, 347 B.R. 708 (Bankr. C.D. Ca. 2006).

- *Commercial Credit Counseling Services, Inc. v. W.W. Grainger, Inc.*, 840 N.E.2d 843 (Ind. App. 2006) – A debtor granted a security interest to a credit counseling service to cover its fees and to facilitate settlements with creditors. The grant of the security interest was made with actual intent to hinder, delay, or defraud the creditors of the debtor because the counseling service advertised this as an "asset protection strategy" designed to stop litigating creditors from bypassing the service and getting paid ahead of cooperating creditors.

- *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broadcasting Corp.*, 2006 WL 1875918 (Del. Ch. 2006) – A preferred stockholder did not have standing to bring a fraudulent transfer claim against a corporation, despite new GAAP rule treating preferred stock as "debt," because the preferred stockholder was not a "creditor" for purposes of the state fraudulent transfer statute.

- *In re National Forge Co.,* 344 B.R. 340 (W.D. Pa. 2006) – Bankruptcy Code § 546(e) insulates from avoidance any fraudulent transfer involved in the redemption of shares of a privately-held corporation.

V. FINANCIAL INSTITUTIONS

A. Regulatory and Tort Claims – Good Faith, Fiduciary Duties, Interference With Prospective Economic Advantage, Libel, Invasion of Privacy

- *In re Scott Acquisition Corp.*, 344 B.R. 283 (Bankr. D.Del. 2006) – Directors and officers of an insolvent corporation owe fiduciary duties to both its creditors and the corporation itself.

- *In re Cit Corp.*, 448 F.3d 672 (3d Cir. May 26, 2006) – A claim of negligence cannot sustain a deepening-insolvency cause of action (in the absence of fraud).

- *In re VarTec Telecom, Inc.*, 335 B.R. 631 (Bankr. N.D. Tex. 2005) – "Deepening insolvency" is not a separate tort under Texas law, absent a specific duty to the company.

- *Trenwick America Litigation Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168 (Del. Ch. 2006) – Delaware does not impose a retroactive fiduciary duty on corporate directors because a business plan does not succeed nor does it recognize a cause of action for deepening insolvency.

- *CitiCapital Commercial Corp. v. First Nat'l Bank of Fort Smith*, No. 3:04-CV-0302-B, 2005 U.S. Dist. LEXIS 6310 (N.D. Tex. 2005), *summary judgment granted in part and denied in part* 2006 U.S. Dist. LEXIS 13750 (N.D. Tex. 2006) – A lockbox bank has no fiduciary duties to a factor. The lockbox bank is liable as a matter of contract for debtor's improper access to the account if the lockbox agreement provided that the debtor should not have access.

- *Power & Telephone Supply Co. v. SunTrust Banks, Inc.*, 447 F.3d 923 (6th Cir. 2006) – The lead bank under a credit facility, which also executed interest rate swaps with borrower, did not owe any duty to the borrower to advise it on the appropriateness of the transactions. No negligence claim could be sustained against the bank.

- *Ary Jewelers, LLC. v. IBJTC Business Credit Corp.*, 414 F. Supp. 2d 90 (D. Mass. 2006) – A potential lender backed out of deal upon learning of a foreign bribery scandal involving a principal of the prospective bor-

rower. The first lender later informed another potential lender of those facts, and the second lender did not proceed with the deal. The borrower may have a claim for tortious interference with business relations against the first lender.

- *Martens v. Ariana & Nathaniel Contracting, Inc.*, 2006 WL 2987741 (W.D. Pa. 2006) – A secured lender's contractual *right* to inspect a manufactured home during construction did not give it a *duty* to protect the debtor from negligent or fraudulent construction.

- *Minnesota Voyageur Houseboats, Inc. v. Las Vegas Marine Supply, Inc.*, 708 N.W.2d 521 (Minn. 2006) – A bank's contractual right to setoff, expressly granted in a promissory note, was not subject to the limitation on the common law equitable right of setoff that the debt be due and owing. As a result, the bank had priority over creditor that served writ of garnishment on the bank.

- *Geiger & Peters, Inc. v. Berghoff*, 854 N.E.2d 842 (Ind. Ct. App. 2006) – A corporate president – who also served as president of a competitor – did not owe a fiduciary duty to the guarantor of the corporation's debts or to a secured creditor of the corporation, and thus could not be liable for tortious interference with a business relationship.

- *The Bank of New York v. Federal Deposit Insurance Company,* 453 F.Supp. 2d 82 (D.D.C. 2006) – An early amortization clause (*ipso facto* clause) in a master indenture between the trustee and an SPE that was "accepted and acknowledged" by a bank (credit card issuer and servicer) relating to a securitization of credit card receivables was not enforceable against the FDIC. The *ipso facto* clause would have released principal in the transaction to the noteholders on an accelerated schedule instead of paying the principal to the FDIC (as receiver of the bank). For purposes of 12 USCA § 1821(e)(12)(A) ("the FDIC as receiver [has] the authority to enforce contracts entered into by [a] depository institution in receivership notwithstanding any contract clause providing for termination, acceleration or default solely by reason of insolvency or the appointment of the receiver.") the bank had entered into the master indenture.

- *Barrett v. Freifeld*, 236 N.Y.L.J. 89, 2006 N.Y. Misc. LEXIS 3230 (S. Ct. NY 2006) – A broker in an acquisition transaction could be liable for fraudulent concealment based on its alleged knowledge of deficiencies

in the financial statements of the target company. The broker owed a fiduciary duty to the buyer to make full disclosures of all the facts.

- *Collins v. First Union National Bank*, 272 Va. 744, 636 S.E.2d 442 (Va. 2006) – A bank did not owe a duty of care to individuals who were defrauded by the actions of others who used accounts at the bank to accomplish the fraud.

- *In re First Alliance Mortgage Company*, 471 F.3d 977 (9th Cir. 2006) – A lender to an entity that defrauded its borrowers could be liable for aiding and abetting the fraudulent activities of its borrower. Under California tort law, a person can be liable for aiding and abetting the tort of another if the person alleged to have engaged in the aiding and abetting "knows" that the other person's conduct constitutes a breach of duty and gives "substantial assistance or encouragement" to the other person's activities that are a tort.

- In *Miller v. Bank of America*, 144 Cal.App.4th 1301, 51 Cal. Rptr. 3d 223 (Cal. Ct. App. 2006) – A bank could apply overdrafts to deposits of otherwise exempt Social Security benefits without violating the exempt status of those benefits. The court distinguished the decision in *Kruger v. Wells Fargo Bank*, 521 P.2d 441 (Cal. 1974), where the court held that a bank could not set off on unrelated claims against exempt assets held in a deposit account.

B. Agent Banks

- *In re United Airlines*, 438 F.3d 720 (7th Cir. 2006) – As a debtor approached its bankruptcy filing, the trustee for some airport construction bonds refused to release reimbursement payments it owed to the debtor under the bonds. The court concluded that while the trustee had a fiduciary duty to its bondholders, it also had a duty of good faith and fair dealing to the debtor, which was a third-party beneficiary of the bond agreements. The court stated that "[o]ur decision today stands for the simple propositions that parties will be held to their deals and that one party may not manipulate the timing of its payments to exploit the vulnerabilities of the other".

- *Beal Savings Bank v. Sommer*, 815 N.Y.S.2d 63 (N.Y. App. Div. 1st Dep't), *appeal granted* 822 N.Y.S.2d 482 (2006) – Individual creditors had no

right to pursue direct action against guarantors without authorization from a super-majority of creditors under a credit facility.

- *Precision Theatrical Effects, Inc. v. United Banks, N.A.*, 143 P.3d 442, 60 UCC Rep Serv 2d 1339 (Mont. 2006) – A bank froze a borrower's deposit account upon learning of the arrest of the borrower's president and owner – a fact that placed the borrower's license to operate in jeopardy. The loan agreement allowed such action upon a good faith belief that the bank would have difficulty collecting the amount owed. However, the bank may not have acted in good faith because it had $1.6 million in other collateral to secure a debt of $211,000.

C. Obligations Under Corporate Laws

- *Stone v. Ritter*, 911 A.2d 362 (Del. 2006) – A director may enforce an exculpation clause as it applies to abandonment of duty involving negligence or gross negligence, but not intentional conduct.

- *Utah State Tax Commission v. Stevenson*, Utah, 567 Utah Adv. Rep. 35 (UT 2006) – A treasurer of a taxpayer was not personally liable for state withholding taxes because he paid other creditors before payment of the withholding taxes.

D. Securities Laws

- *Bank of New York v. BearingPoint*, 13 Misc.3d 1209(A), 824 N.Y.S.2d 752 (NY Sup. Ct. 2006) – An issuer's failure to provide copies of its financials included in its SEC filings to an indenture trustee and bondholders as required by the indenture was an event of default, even though the issuer had not yet made its SEC filings that would include those financial statements (because of a problem with its accounting systems).

- *Nisselson, Trustee of the Dictaphone Litigation Trust v. Lernout*, 469 F.3d 143 (1st Cir. Mass. 2006) – One company acquired a second company by having the second company merge into a subsidiary of the acquiring company. The acquiring company had misrepresented the value of its stock that it used to pay the acquisition price of the target company. When everybody went bankrupt, the trustee for the surviving subsidiary sought to bring actions against the acquiring company based on misrepresentations in connection with the acquisition. The court held

that the trustee could not bring those claims because in effect it was suing itself at that time.

VI. UCC - SALES AND PERSONAL PROPERTY LEASING

A. Scope

1. General

- *American Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61 (D. R.I. 2006) – A choice-of-law clause selecting the law of a state was enough to opt out of the United Nations Convention on Contracts for the International Sale of Goods (CISG).

- *Berry v. Ken M. Spooner Farms, Inc.*, 2006 WL 1009299, 59 UCC Rep Serv 2d 443 (W.D.Wa. 2006) – Where CISG applies, it does not address questions about the enforceability of a limitation of liability clause. It reaches only questions of formation and rights and obligations of the seller and buyer arising from the contract.

- *Bazak International Corp. v. Tarrant Apparel Group*, 2005 WL 1705095, 58 UCC Rep Serv 2d 612 (S.D.N.Y. 2005) – An e-mail satisfied the requirements of the statute of frauds, including the requirement of a "signed" writing. UCC § 2-201.

- *Taylor v. Hoffman Ford, Inc.*, 2005 WL 2503722, 57 UCC Rep Serv 2d 805 (Conn. Super. 2005) – A seller that accepted a $5,000 check as a deposit on a car sufficiently indicated its intent to enter into and form a binding contract under Article 2. UCC § 2-204.

- *Scruggs v. Caba*, 2005 WL 2503719, 57 UCC Rep Serv 2d 890 (Conn. Super. 2005) – A poodle is a "good" under UCC § 2-105, and a contract for the sale of the poodle must be in writing.

- *Randazzo v. McCarthy*, 2005 WL 2361588, 58 UCC Rep Serv 2d 675 (Conn. Super. 2005) – A pony is a "good" under UCC § 2-105. A blind pony was not merchantable, and therefore the seller breached the implied warranty of merchantability. UCC § 2-314.

- *In re Rezulin Products Liability Litigation*, 2005 WL 2293122, 59 UCC Rep Serv 511 (S.D.N.Y. 2005) – A health benefit provider that paid for drugs, but did not obtain any property interest in the drugs, was

not a "buyer" of the drugs, and therefore UCC Article 2 did not apply to its claims.

- *Orix Financial Services Inc. v. Hoxit*, 2006 N.Y. Misc. LEXIS 2367, 236 N.Y.L.J. 44 (S.Ct. NY 2006) – Although a contract for the sale of goods also involved the financing of the goods, the contact was primarily for the sale of goods, and the applicable statute of limitations was the one that applies to the sale of goods and not to a financing transaction.

- *Rite Aid Corp. v. Levy-Gray*, 2006 WL 584637, 59 UCC Rep Serv 2d 807 (Md.App. 2006) – Although prescription drugs often are not subject to the warranty rules of Article 2, where there was a direct transaction between the pharmacy and the patient, the rules of Article 2 could apply.

- *Gordon v. Acrocrete, Inc.*, 2005 WL 3133779, 58 UCC Rep Serv 2d 361 (S.D.Ala. 2005) – The implied warranties of Article 2 of the UCC do not apply to stucco applied to the outside of a house that was not separable from the real property.

2. *Software and Other Intangibles*

- *RegScan, Inc. v. Con-Way Transp. Services, Inc.*, 875 A.2d 332, 57 UCC Rep Serv 2d 533 (PA Super 2005) – UCC § 2-208's open price term provision applied to a software license with an open price term and the license was enforceable.

- *In re Mystic Tank Lines Corp.*, 47 Bankr. Ct. Dec. 118, 2006 Bankr. LEXIS 3157 (Bankr. D. N.J. 2006) – Article 2 applied to off-the-shelf software. The implied warranties of Article 2 were available to the "buyer" of the software.

B. *Contract Formation and Modification; Statute of Frauds; "Battle of the Forms;" Contract Interpretation; Title Issues*

1. *General*

- *Cordy v. Vanderbilt Mortgage & Finance, Inc.*, 445 F.3d 1106 (8th Cir. 2006) – A floor-plan financer agreed to lend up to 65% of wholesale value. Instead, it loaned up to 65% of retail value. This practice did

not modify the deal because the agreement provided for a separate statement of transaction for each financed vehicle and provided that the statement would not modify the terms of the deal. The practice also did not create a course of dealing that the borrower could enforce because the written agreement contained a clause prohibiting modification by course of dealing.

- *Treibacher Industrie A.G. v. Allegheny Technologies, Inc.*, 464 F.3d 1235 (11th Cir. 2006) – A course of dealing trumps usage of trade in interpreting an agreement to buy and sell goods governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG).

- *Pro Golf of Fla., Inc. v. Pro Golf of America, Inc.*, 2006 WL 508631 (E.D. Mich. 2006) – Internet sales occur from the place where the seller ships, not where the buyer receives, the goods for the purposes of applying a franchise agreement's exclusive right to sell in a certain territory.

- *Shlomo Bar-Ayal v. Time Warner Cable Inc.,* 2006 U.S. Dist. LEXIS 75972 (S.D.N.Y. 2006) – A licensee of software indicated its assent to the terms of the license agreement by clicking on agreement buttons online.

- *Treiber & Straub Inc. v. United Parcel Service Inc.*, 2007 U.S. App. LEXIS 363 (7th Cir. 2007) – A person that entered into an online agreement to purchase services was bound by the limitations of liability term contained in information linked to the online agreement.

- *Dow Chemical Co. v. General Electric Co.*, 2005 WL 1862418, 58 UCC Rep Serv 2d 74 (E.D. Mich. 2005) – An exchange of e-mail messages could satisfy the statute of frauds for the sale of goods where there was evidence of an intent to form an agreement.

- *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 714 N.W.2d 530, 2006 WL 1348393, 59 UCC Rep Serv 603 (Wis. 2006) – No writing is required under UCC Article 2 if the intention to form a contract may be inferred from the conduct of the parties. UCC § 2-209.

2. *Battle of the Forms*

- *Wachter Mgmt. Co. v. Dexter & Chaney Inc.* 144 P.3d 747 (Kan. 2006) – A buyer of a license of software signed an agreement providing for terms and conditions in connection with the sale. Later, the delivery of the software included a shrinkwrap license that contained additional terms. The court held that the licensee was not bound by the additional terms. The court distinguished other decisions enforcing shrinkwrap licenses because those shrinkwrap licenses did not attempt to supplement existing agreements between the parties to the transaction.

- *Marvin Lumber and Cedar Co. v. PPG Industries, Inc.*, 2005 WL 659125, 57 UCC Rep Serv 2d 18 (8th Cir. 2005) – A limitation on damages was a material alteration for purposes of UCC § 2-207.

- *Belanger, Inc. v. Car Wash Consultants, Inc.*, 452 F.Supp.2d 761 (E.D.Mi. 2006) – A choice of law clause was a "material" modification of an agreement. UCC § 2-207.

- *Stemcor USA Inc. v. Trident Steel Corp.*, 2006 U.S. Dist. LEXIS 79334 (S.D.N.Y. 2006) – Pursuant to UCC § 2-207, provisions in a "battle of the forms" expressly requiring acceptance of only the terms of each contract meant that no agreement had been reached and the default rules of Article 2 applied.

- *Roanoke Cement Co., L.L.C. v. Falk Corp.*, 2005 WL 1539293, 58 UCC Rep Serv 2d 908 (4th Cir. 2005) – A buyer of goods did not object to the terms of the seller's purchase order, which excluded consequential damages. The buyer's acknowledgement meant that the terms of the seller's agreement prevailed.

C. Warranties and Products Liability

1. Warranties

- *Stone Transport, Inc. v. Volvo Trucks North America Inc.*, 129 Fed.Appx. 205, 2005 WL 873402, 2005 Fed.App. 0287N, 57 UCC Rep Serv 2d 77 (6th Cir. 2005) – A seller of goods that has made a warranty with respect to the goods breaches that warranty even if the breach is not negligent. A warranty is a contractual promise that specified facts are true and does not require any fault in order to breach the warranty.

- *Monticello v. Winnebago Industries, Inc.*, 369 F. Supp. 2d 1350, 57 UCC Rep Serv 2d 280 (N.D. Ga. 2005) – A warranty of merchantability is made only to the seller's immediate buyer. A remote buyer cannot bring a claim in the absence of privity.

- *Sanders v. City of Fresno*, 2006 WL 1883394, 59 UCC Rep Serv 2d 1209 (E.D. Ca. 2006) – A person shot with a taser gun could not bring an action based on Article 2 because that person was not in privity with the manufacturer of the taser gun.

- *Klickitat County Public Utility District No. 1 v. Stewart & Stevenson Services, Inc.*, 2006 WL 908042, 59 UCC Rep Serv 2d 408 (E.D.Wa. 2006) – A final written contract displaced any pre-contractual oral representations and warranties in an equipment lease. UCC § 2-316.

- *Gernhardt v. Winnebago Industries*, 2005 WL 2562783, 58 UCC Rep Serv 2d 28 (E.D. Mich. 2005) – Vertical privity not required for a buyer to bring a breach of implied warranty action for lost economic benefits.

- *Ball v. Sony Electronics Inc.*, 2005 WL 2406145, 58 UCC Rep Serv 2d 494 (W.D. Wis. 2005) – Article 2 implied warranties do not apply to buyer not in privity with the manufacturer.

- *Leyva v. Coachmen R.V. Co.*, 2005 WL 2246835, 59 UCC Rep Serv 456 (E.D.Mich. 2005) – The implied warranty of merchantability extends to remote buyers who are not in privity of contract with the manufacturer.

- *Phillips v. Cricket Lighters*, 883 A.2d 439, 58 UCC Rep Serv 2d 827 (Pa. 2005) – A disposable lighter satisfied the implied warranty of merchantability even though it did not have a child-resistant feature. The implied warranty of merchantability does not require that the product be of the best quality; rather, it must have inherent soundness. UCC § 2-314.

- *Krajewski v. Enderes Tool Co., Inc.*, 396 F.Supp.2d 1045, 59 UCC Rep Serv 2d 1 (D.Neb. 2005) – A claim based on statements on the packaging of a good did not support a claim for breach of an express warranty where the evidence showed that the buyer had not relied on those statements.

2. *Limitation of Liability*

   - *Piper Jaffray & Co. v. SunGard Systems Intern., Inc.*, 2005 WL 999975, 57 UCC Rep Serv 2d 479 (D. Minn. 2005) – Even though a remedy failed of its essential purpose, a companion limitation of damages was still effective. There was nothing in the contract that indicated that the effectiveness of the limitation of damages was dependent on the effectiveness of the remedy limitation. UCC § 2-719.

   - *Braun v. E.I. du Pont De Nemours and Co.*, 2006 WL 290552, 58 UCC Rep Serv 2d 868 (D.S.D. 2006) – A disclaimer of warranties for an herbicide that left the farmer with no remedy was unconscionable. UCC § 2-302.

   - *In re Exemplar Mfg. Co.*, 331 BR 704, 59 UCC Rep Serv.2d 941 (Bankr. E.D.Mich. 2005) – A liquidated damages provision was not enforceable where it bore no relation "whatsoever" to the actual losses that the party seeking to enforce the provision expected to suffer. UCC § 2-718.

   - *Levin v. Airgas Southwest, Inc.*, 2006 WL 1305040, 59 UCC Rep Serv 2d 561 (D.N.M. 2006) – A limitation of liability on the back of an agreement was sufficiently "conspicuous" where the front to the agreement directed the person reading the agreement to see "reverse side for important safety information." UCC §§ 1-201(10), revised 1-201(b)(10).

   - *Lambert v. Monaco Coach Corp.*, 2005 WL 1227485, 57 UCC Rep Serv 2d 719 (M.D. Fl. 2005) – A disclaimer of warranties was "conspicuous" when it followed a caption that said "exclusions of warranties" and the actual language of the exclusion was printed in all capitals and underlined. UCC §§ 1-201(10), revised 1-201(b)(10), 2-316.

3. "*Economic Loss*" *Doctrine*

   - *Kraft Foods North America, Inc. v. Banner Engineering & Sales, Inc.*, 446 F.Supp.2d 551(E.D.Va 2006) – A tort claim cannot be based solely on negligent breach of contract and there must be breach of an independent tort duty. A limitation on consequential damages was not part of the contract because the buyer's contract had the effect of rejecting that limitation.

- *Blackhawk State Bank v. Fiserv, Inc.*, 712 N.W.2d 86, 58 UCC Rep Serv 2d 993 (Wi.App. 2006) – The economic loss doctrine does not apply to a contract for services. Accordingly, it did not bar bringing a tort claim for a conversion.

D. Performance, Breach and Damages

- *Smith v. Robertshaw Controls Co.*, 410 F.3d 29, 57 UCC Rep Serv 2d 750 (1st Cir. 2005) – A buyer that has given an unreasonably late notice of its revocation of acceptance may still proceed with revocation unless the late notice has prejudiced the seller. UCC § 2-607.

- *Audiovox Corp. v. Schindler*, 2005 WL 1060609, 57 UCC Rep Serv 2d 447 (Oh.App. 2005) – A seller that routinely accepted late payments established a course of performance that allowed the buyer to continue to make late payments without breaching the contract.

- *Midwest Generation, LLC v. Carbon Processing and Reclamation, LLC*, 445 F.Supp.2d 928 (N.D. Ill. 2006) – A buyer of nonconforming goods waived its objections to the goods by accepting the goods and taking actions inconsistent with the seller's ownership of the goods.

- *In re Tucker*, 329 BR 291, 59 UCC Rep Serv.2d 1131 (Bankr. D.Az 2005) – Both cash and credit sellers have reclamation rights under Article 2. UCC § 2-702.

- *Joy and Middlebelt Sunoco, Inc. v. Fusion Oil, Inc.*, 2006 WL 846742, 59 UCC Rep Serv 2d 745 (E.D.Mich. 2006) – A franchisor's assignment of a franchise agreement did not materially increase the franchisee's obligations. UCC § 2-210.

- *Lam Research Corp. v. Dallas Semiconductor Corp.*, 2006 WL 1000573, 59 UCC Rep.Serv.2d 716 (Cal.App. 6 Dist. 2006) – A seller that broke down goods that the buyer was supposed to pay for into components and used those components to manufacture other goods was a "lost volume" seller entitled to the lost volume seller damages measures. UCC § 2-708.

- *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 445 F.3d 1132, 59 UCC Rep Serv 297, *reprinted as amended*, 465 F.3d 946 (9th Cir. 2006) – In a transaction subject to Article 2, an agreement allowing a set off between

different obligations not arising under the same agreement was not enforceable due to the displacement of common-law setoff rights under UCC § 2-717.

- *National Eastern Corp. v. Vegas Fastener MFG*, 2006 WL 758634, 59 UCC Rep Serv 2d 330 (D.Conn. 2006) – A buyer of nuts and bolts to be used on a bridge did not have to show that the defects "substantially impaired" the value of the contract. It was sufficient to show that there was a differential between the value of the nuts and bolts as warranted and their actual value as delivered.

E. Personal Property Leasing

- *Wells Fargo Bank, N.A. v. BrooksAmerica Mortgage Corp.*, 419 F.3d 107, 57 UCC Rep Serv 2d 980 (2d Cir. 2005) – A court enforced a "hell or high water clause" against a lessee in favor of an assignee of a lessor, even though the lessor was in breach of its obligations to the lessee. UCC § 9-403.

- *Wells Fargo Bank Minnesota, N.A. v. B.C.B.U.*, 143 Cal.App.4th 493, 49 Cal.Rptr.3d 324 (Cal. App. 4th 2006) – A lessee waived certain rights under an equipment lease. The waiver was not effective under Article 2A because the goods had not been delivered yet. UCC § 2A-407. However, the waiver was effective under Article 9 in connection with the assignment of the lessor's rights. UCC § 9-403. The court held that the Article 9 provisions could be operative in this circumstance.

- *Liberty Capital Resources, Inc. v. Garcia*, 2005 WL 638155, 57 UCC Rep Serv 2d 1 (Cal.App.5th 2005) – The court enforced a choice-of-law cause in a finance lease.

- *De Lage Landen Financial Services, Inc. v. M.B. Management Co., Inc.*, 888 A.2d 895, 58 UCC Rep Serv 2d 227 (Pa. Super. 2005) – The parties to a lease may by agreement constitute the lease a "finance lease." UCC § 2A-103, comment g.

- *First Nonprofit Insurance Co. v. MiraLink Corp.*, 2006 WL 1156393, 59 UCC Rep Serv 451 (N.D.Ill. 2006) – A supplier's promises to a lessor extended to the lessee. The provisions in UCC Article 2A protect finance lessors, but do not protect the vendor. UCC § 2A-209.

VII. COMMERCIAL PAPER, ELECTRONIC FUNDS AND TRANSFERS

A. Negotiable Instruments and Holder in Due Course

- *Parks v. Commerce Bank, N.A.*, 872 A.2d 1116, 57 UCC Rep Serv 2d 576 (N.J.Super.A.D. 2005) – A bank cannot stop payment on a cashier's check issued by the bank. UCC § 3-412.

- *Asian American Bank & Trust Co. v. Dermenjian*, 825 N.E.2d 383, 57 UCC Rep Serv 2d 249 (Mass.App.Ct. 2005) – A contract required an obligor to deliver a certified check. The obligor instead delivered a cashier's check. The court held that the delivery of the cashier's checks satisfied the requirement of the contract.

- *State ex. rel., Board of Regents for University of Oklahoma v. Livingston*, 111 P.3d 734, 57 UCC Rep Serv 2d 193 (Okla.Civ.App.Div.3 2005) – A note was payable "at a definite time" for purposes of determining whether it was a negotiable instrument when it was payable at the time the maker ceased to carry a "normal full-time academic workload." UCC § 3-108(b).

- *Badalamento v. Blonde*, 2005 WL 991310, 57 UCC Rep Serv 2d 186, (Mich. App. 2005); *motion for reconsideration granted and opinion vacated at* 2005 WL 1536835 (Mich.App. 2005) – A "note" cannot arise out of a series of payments in the absence of a written promise to make those payments.

- *First Federal Savings Bank v. McCubbins*, 2005 WL 858080, 57 UCC Rep Serv 2d 66 (Ky.App. 2005) – A lender that stamped a note "paid in full" cannot overcome the burden of proving that in fact the note had not been paid in full.

- *Wachovia Bank, N.A. v. Foster Bancshares, Inc.*, 457 F.3d 619, 60 UCC Rep Serv 2d 1126 (7th Cir. 2006) – A depositary was liable for an altered check, and not the drawee bank.

- *Robinson Motor Xpress Inc. v. HSBC Bank, USA*, 826 N.Y.S.2d 350 (N.Y.A.D. 2nd Dept. 2006) – A bank that did not mail account statements to the addressee specified in its agreement with its customer could not

rely on UCC § 4-406 to preclude the customer from making claims with respect to information contained in the account statements.

- *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, , 57 UCC Rep Serv 2d 392 (7th Cir. 2005) – A financial institution accepted checks payable to a doctor with forged endorsements and deposited to the account of an employee of the doctor. On a comparative fault basis, the bank bore 90% of the loss. The depositary bank's employees had found it "odd" that the employee was being paid by third-party checks.

- *Gem Global Yield Fund Ltd. v Surgilight Inc.*, 2006 WL 2389345, 04-CV-4451 (S.D.N.Y. 2006) – A note that provided for payment in stock, and not money, did not include an unconditional promise to pay a sum certain and was therefore not a "negotiable instrument." UCC § 3–104.

- *Camofi Master LDC. v. College Partnership, Inc.*, 452 F.Supp.2d 462 (S.D.N.Y. 2006) – A borrower could not bring a fraudulent inducement claim against the payee of a note where the claim was based on alleged fraudulent activities of the borrower's financial adviser under a separate agreement.

- *Socar, Inc. v. Regions Bank (Inc.)(Alabama)*, 2006 WL 1734268, 59 UCC Rep Serv 2d 1218 (N.D.Ga. 2006) – Where a check was payable to a set of "stacked" payees, the check was ambiguous as to whether the payees were joint or several. As a result, the check could be paid to them in the alternative. UCC §§ 3-110, 3-420.

- *Kronemeyer v. U.S. Bank National Association*, 857 N.E.2d 686, 59 UCC Rep Serv 2d 1205 (Ill.App. 5th Dist. 2006) – A payee of a check is not a customer of the drawee bank and may not bring an action for a wrongful dishonor. UCC § 4-402.

- *Farmers Bank of Maryland v. Chicago Title Insurance Co.*, 163 Md. App. 158, 877 A.2d 1145, 59 UCC Rep Serv 2d 694 (Md.App. 2005); *judgment aff'd by Chicago Title Ins. Co. v. Allfirst Bank*, 905 A.2d 366, 60 UCC Rep Serv 2d 864 (Md. 2006), – A drawer's claim for negligence against a depositary bank was not displaced by UCC § 3-420.

- *Traveler's Casualty & Surety Co. of America v. Manufacturers Life Insurance Co.*, 2005 WL 2420401, 59 UCC Rep Serv 2d 1081 (N.D.Ill. 2005) – The UCC displaces a common-law claim whenever the UCC articulates a

loss distribution scheme that applies to the fact pattern involved in a dispute. UCC § 1-103, 3-307.

- *United States Steel Corp. v. Express Enterprises of Pennsylvania, Inc.*, 2006 WL 771407, 59 UCC Rep Serv 2d 389 (Pa.Com.Pl. 2006) – The UCC displaces any common law negligence claims based on the cashing of a forged check. UCC § 3-404.

- *Gil v. Bank of America, N.A.*, 42 Cal.Rptr.3d 310, 59 UCC Rep Serv 2d 755 (Cal.App.2d 2006) – The UCC's conversion rules displace a common-law negligence claim based on a deposit of a check not bearing the endorsement of one of the payees. UCC § 3-420.

- *Fink v. Hobbs*, 2005 WL 2406060, 59 UCC Rep Serv 2d 1105 (M.D.Ga. 2005) – A promissory note that stated that it was given "for value received," but did not specify the consideration received, was incomplete. The maker could assert inadequate consideration as a defense against the original payee.

- *Brault v. Graydon*, 2006 WL 1738257, 59 UCC Rep Serv 2d 1181 (Conn. Super. 2006) – A note given to represent an existing debt had adequate consideration to be enforceable. UCC § 3-303.

  Comment: Article 1's definition of "value" does not apply to Article 3. UCC §§ 1-201(44), revised 1-204, although the result would be the same here under either definition.

- *Prestridge v. Bank of Jena*, 924 So.2d 1266, 59 UCC Rep Serv 2d 103 (La.App.3d 2006) – The fact that an account holder's relative had access to the account holder's checks did not of itself constitute negligence contributing to a forgery on the check.

- *Griffith v. Mellon Bank, N.A.*, 173 Fed.Appx. 131, 59 UCC Rep Serv 2d 135 (3d Cir. 2006) – A common-law presumption that after 20 years all debts have been presumed to be paid was not precluded by the applicable statute of limitations under Article 3. UCC § 3-118.

- *Mary Margaret Bibler v. Arcata Investments 2, LLC*, 2005 WL 3304127, 58 UCC Rep Serv 2d 244 (Mich.App. 2005) – A note's reference to a mortgage for rights to accelerate and other terms permitted by Article 3 does not destroy the negotiability of the note. UCC § 3-104.

- *FFP Marketing Co., Inc. v. Long Lane Master Trust IV*, 169 S.W.3d 402, 58 UCC Rep Serv 2d 855 (Tx.App. 2005) – A note that incorporated by reference the terms of other agreements was not negotiable because it required looking at the other agreements to determine if conditions to the obligations had been satisfied.

- *Harstock v. Rich's Employees Credit Union*, 632 S.E.2d 476, 59 UCC Rep Serv 2d 628 (Ga.App. 2006) – A payee of a check may not bring a conversion action where the check is intercepted and stolen prior to delivery to the payee. UCC § 3-420.

- *Mississippi Bulk Transport, Inc. v. Union Planters Bank, N.A.*, 2005 WL 3240570, 58 UCC Rep Serv 2d 478 (N.D.Miss. 2005) – A claim for conversion of an instrument may not be maintained by the issuer of the instrument nor by the payee, unless the payee has received delivery of the instrument.

B. Payment-in-Full Checks

- *IFC Credit Corp. v. Bulk Petroleum Corp.*, 403 F.3d 869, 57 UCC Rep Serv 2d 199 (7th Cir. 2005) – A check tendered with an accompanying letter that stated that the check was being tendered as payment in full satisfied the accord and satisfaction requirements of UCC § 3-311. Although the check was supposed to be sent to a "designated" person, the fact that it was not directed to that person did not matter because it in fact did reach that person.

- *Ross Brothers Construction Co. v. Mark West Hydrocarbon, Inc.*, 2005 WL 1378841, 58 UCC Rep Serv 2d 799 (E.D.Ky. 2005) – The tender of a payment-in-full check for an amount of about 40% of the amount claimed by the creditor, combined with other indications of a *bona fide* dispute, supported the conclusion that the obligor had tendered the payment-in-full check in good faith. UCC § 3-311.

- *Caddell v. CitiMortgage, Inc.*, 2006 WL 625970, 59 UCC Rep Serv 2d 181 (D.Kan. 2006) – An obligor who tendered a check for $200 to seek to satisfy an obligation of $118,000 did not tender the check in "good faith" where the obligor conceded that she owed the larger amount. UCC § 3-311.

- *Weston Builders & Developers, Inc. v. McBerry, LLC*, 891 A.2d 430, 59 UCC Rep Serv 2d 205 (Md.App. 2006) – A check did not operate as "payment in full" where neither the check nor any communication accompanying the check indicated it was intended as an accord and satisfaction. UCC § 3-311.

- *Hoerstman General Contracting, Inc. v. Hahn*, 711 N.W.2d 340, 59 UCC Rep Serv 2d 308 (Mich. 2006) – A check tendered with a notation "final payment" sufficiently indicated that it was intended as payment in full of the related obligation.

C. Electronic Funds Transfer

- *Zengen, Inc. v. Comerica Bank*, 140 P.3d 656 (Cal. 2006) – Article 4A displaces common-law claims for unauthorized funds transfers.

- *Schlegel v. Bank of America, N.A.*, 628 S.E.2d 362, 59 UCC Rep Serv 2d 797 (Va. 2006) – Article 4A displaces common-law claims based on unauthorized payment orders. UCC §§ 4A-102, 4A-204.

- *Seamar Shipping Corp. v. Kremikovtzi Trade Ltd.*, 461 F.Supp.2d 222 (S.D.N.Y. 2006) – A beneficiary of an electronic funds transfer had no rights in the transfer until the funds had been received by the beneficiary's bank.

- *Phil & Kathy's Inc. v. Safra National Bank of New York*, 2006 WL 3208587 (S.D.N.Y. 2006) – A bank was not liable where it correctly applied duplicate payment orders for the benefit of the beneficiary.

D. Usury

- *Brown v. 1514 W. Thomas L.L.C.*, No. 257017, 2006 Mich. App. LEXIS 1057 (Mich.App. 2006) – The Illinois LLC Act permits LLCs organized under Illinois law to contract for any rate of interest regardless of usury laws.

  Comment: Under Illinois law, this right does not expressly extend to LLCs organized under the laws of other states. Lenders must find a separate exemption from Illinois usury law or argue by analogy that an LLC is like a corporation or partnership.

VIII. LETTERS OF CREDIT, INVESTMENT SECURITIES, AND DOCUMENTS OF TITLE

A. Letters of Credit

- *In re Onecast Media, Inc.*, 439 F.3d 558 (9th Cir. 2006) – A lessor made a draw under a letter of credit to obtain funds to cover missed rent payments. Although the lessor's right to draw was not subject to the automatic stay, the court did have jurisdiction to determine if the lessor held any proceeds of the letter of credit in excess of the amounts due to the lessor.

- *In re Spring Ford Industries,* 338 B.R. 255 (E.D. Pa. 2006) – Excess proceeds from draw on letter of credit belong to the applicant, not the issuer.

- *Blonder & Co., Inc. v. Citibank N.A.*, 28 A.D.3d 180 (N.Y.A.D. 1st Dept. 2006) – An issuer of a letter of credit cannot use expert testimony as to international standard banking practice that conflicted with the provisions of UCP 500.

- *MSF Holding Ltd. v. Fiduciary Trust Company International*, 435 F.Supp.2d 285 (S.D.N.Y. 2006) – A letter of credit was issued in favor of a parent corporation. Its subsidiary sought to enforce the letter of credit. The court held that the attempt by the subsidiary to enforce the letter of credit was a *de facto* assignment of the letter of credit. Because the assignment did not comply with the requirements of UCC § 5-116, it was not valid and the subsidiary did not have standing to enforce the letter of credit on behalf of the beneficiary of the letter of credit.

- *BM Electronics Corporation v. LaSalle Bank NA*, 2006 WL 760196, 59 UCC Rep.Serv. 2d 280 (N.D. Ill. 2006) – A beneficiary of a letter of credit that failed to supply an inspection certificate and other documents required by the letter of credit did not satisfy the "strict compliance" requirements of letter of credit law and was not entitled to payment under a letter of credit. UCC § 5-108.

- *Golden West Refining Co. v. Suntrust Bank*, 2006 WL 4007267 (9th Cir. 2006) – UCC § 5-106 provides that a "perpetual" letter of credit expires

no later than five years after its date of issuance. The court held that a letter of credit providing for automatic one-year renewals, absent a termination notice from the beneficiary, was not "perpetual," and therefore could continue beyond five years.

- *Travelers Indemnity Co. v. U.S. Bank N.A.*, 2006 WL 1074910, 59 UCC Rep Serv 2d 786 (Conn. Super. 2006) – An issuer that declines to honor a draw under a letter of credit may base that decision only on discrepancies stated in the notice of dishonor. UCC § 5-108.

- *Fisher v. Dakota Community Bank*, 405 F.Supp.2d 1089, 58 UCC Rep Serv 2d 256 (D.N.D. 2005) – Fraud in the underlying transaction is a basis for a court to issue an injunction enjoining an issuer against honoring a draw under a letter of credit.

- *BM Electronics Corporations v. LaSalle Bank, N.A.*, 2006 WL 760196, 59 UCC Rep Serv 2d 280 (N.D.Ill. 2006) – In the absence of any agreement providing for a choice of law, a letter of credit is governed by the law of the location of the bank that issues the letter of credit. UCC § 5-116.

- *J.P. Morgan Trust Co., N.A. v. U.S. Bank, N.A.*, 446 F.Supp.2d 956, 59 UCC Rep Serv 2d 597 (E.D.Wi. 2006) – A letter of credit provided for automatic renewals, but also stated that it could not be renewed beyond a specific date. The issuer did not have to advise the beneficiary that the letter of credit would expire on that day.

- *J.P. Morgan Trust Co., N.A. v. U.S. Bank, N.A.*, 381 F.Supp.2d 865, 59 UCC Rep Serv 2d 835 (E.D.Wi. 2005) – An issuer of a letter of credit may decline to honor a draw request when the documents presented are fraudulent.

B. Investment Securities

- *Highland Capital Management LP v. Schneider*, 460 F.3d 308, 60 UCC Rep Serv 2d 837 (2d Cir. 2006) – Notes issued by an entity to shareholders of acquired corporations could be "securities" under Article 8.

  Comment: Article 8 contemplates that some forms of debt (e.g. publicly traded corporate bonds) will be "securities" rather than "instruments." *See* Prefatory Note III.C to Article 8. This case involves determining where to draw that line. The Second Circuit has certified to the NY

Court of Appeals the question of interpretation of New York's version of Article 8 on this issue.

- *Pine Belt Enterprises, Inc. v. SC & E Administrative Services, Inc.*, 2005 WL 2469672, 59 UCC Rep Serv 2d 963 (D.N.J. 2005) – A securities intermediary was not liable for conversion of funds based on the actions of its customer.

IX. CONTRACTS

A. Formation, Scope, and Meaning of Agreement

- *In re Adelphia Communications Corp.,* 342 B.R. 142, 46 Bankr. Ct. Dec. 148 (Bankr. S.D.N.Y. 2006); *denial of motion for reconsideration at* 2006 WL 2927222 (Bankr. S.D.N.Y. 2006) – A debtor had an obligation to pay interest computed from a grid based on market rates and the debtor's financial condition. The loan documents provided that this information was to be reported by the borrower on a compliance certificate and that the compliance certificate would serve as the basis for the interest rate calculation. The loan documents did not provide that debtor would be retroactively obligated to pay more interest for a period if the debtor inaccurately reported its financial condition. As a matter of contract interpretation, the lenders could not recover additional interest they would have received if a compliance certificate had been accurate.

  Comment: This case has resulted in a change in the way many banks document grid interest transactions.

- *Schwartz v. Comcast Corp.,* 2006 WL 3251092 (E.D.Pa. 2006) – An arbitration agreement between a customer and a cable television provider does not extend to internet services rendered by the same provider unless the agreement so provides.

- *J.R. Simplot Co. v. Bosen*, 2006 WL 3409103 (Id. 2006) – An agent of an LLC who signed a sales agreement without indicating that he signed the agreement in a representative capacity was individually liable on the agreement.

- *Kopple v. Schick Farms, Ltd.*, 447 F.Supp.2d 965 (N.D.Iowa 2006) – A letter of intent was not a binding contract when the letter of intent itself said that the parties would be bound only "upon execution of final contract."

- *Jay Franco and Sons Inc. v G Studios LLC*, 34 A.D.3d 297 (N.Y.A.D. 1st Dept. 2006) – A person can be bound by an unexecuted agreement if there is "objective evidence establishing that the parties intended to be bound." However, where one party sent to the other party an agree-

ment to be signed and the second party never responded to demands that it sign the agreement, there was no indication that the second party intended to be bound.

- *Omega Engineering Inc. v. Omega SA*, 432 F.3d 437 (2d Cir. 2005) – Parties that did not sign a settlement agreement were nevertheless bound by the settlement agreement because they had indicated that they intended to be bound by the agreement.

- *AG Limited v. Liquid Realty Partners, LLC*, 448 F.Supp.2d 583 (S.D.N.Y. 2006) – An investment bank was not entitled to a "success fee" where its client never signed the engagement letter, even though there was e-mail discussion of the terms of the contract and the execution of a confidentiality agreement.

- *Park East Construction Corp. v. East Meadow Union Free School District*, 824 N.Y.S.2d 756 (Supr. Ct. N.Y. 2006) – Persons in a "near-privity" relationship could bring a claim based on a contract even though they were not third-party beneficiaries of the contract.

- *Royal Wine Corporation v. Golan Heights Winery Ltd.*, 448 F.Supp.2d 613 (D.N.J. 2006) – The question of whether one contract supersedes a prior contract or just supplements it is based on the agreement of the parties, and a general reference to the prior contract will not operate to supersede the prior contract.

- *Hyperlogistics Group, Inc. v. Kraton Polymers U.S. LLC*, 437 F.Supp.2d 735 (S.D.Ohio 2006) – An agreement provided for a right of one party to notice of problems in its performance and an opportunity to cure. The notice provision did not specify a method for the giving of notice. The providing of notice of problems by e-mail was sufficient for this purpose under the terms of the contract.

- *Deutsche Bank AG v. Ambac Credit Products LLC*, 2006 U.S. Dist. LEXIS 45322 (S.D.N.Y. 2006) – The court refused to apply an alleged industry practice that would override an express delivery deadline under a contract. Although it was theoretically possible for the industry practice to override the terms of the written contract, there was insufficient evidence to prove the existence of that industry practice.

B. Adhesion Contracts, Unconscionable Agreements, Good Faith and Other Public Policy Limits, Interference with Contract

- *Abry PartnersV, L.P. v F&W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006) – A provision in an M & A agreement that the buyer would not rely on any representations or warranties made outside of the agreement by the seller or third parties was enforceable, even if the statements made outside the agreement were fraudulent. A term in an agreement that the seller was not liable for representations and warranties made in the agreement was also enforceable, unless the seller intentionally made the false statements.

- *Strategix, Ltd. v. Infocrossing West, Inc.*, 142 Cal.App.4th 1068, 48 Cal.Rptr.3d 614 (Cal. App. 4 Dist. 2006) – In connection with a seller's sale of its business, the seller agreed not to solicit the employees and the customers of the combined company (not just the employees and customers of the seller prior to closing). When the provision was challenged by the seller, the court found the entire noncompetition agreement to be unenforceable (even using the word "illegal"), even after the buyer asked that the contract be cut back (rewritten) to cover only the seller's employees and customers. The court stated: "We decline to rewrite the overbroad covenants not to solicit [the buyer's] employees and customers into narrow bars against soliciting [the seller's] former employees and customers. Had the parties intended to reach such limited - and enforceable - covenants, they could have negotiated for them. We will not do so for the parties now."

- *Rosett v. Trepeck*, 2006 WL 1687980 (Mich.App. 2006) – An agreement to settle a $350,000 debt for $25,000, if payment was made within 30 days, or for $100,000, if made later, was an unenforceable penalty.

- *Delta Funding Corp. v. Harris*, 912 A.2d 104 (N.J. 2006) – An arbitration clause in a sub-prime mortgage loan was unconscionable to the extent that it permitted the arbitrator to assess costs against the borrower, limited the arbitrator's discretion to award attorney's fees to the borrower if the borrower was successful, and made the borrower bear the costs of any appeal, even if successful. The court severed the unconscionable provisions from the arbitration clause generally. A provision excluding a mortgage foreclosure from arbitration was not unconscionable.

- *Ohio Savings Bank v. Manhattan Mortgage Co., Inc.*, 455 F.Supp.2d 247 (S.D.N.Y. 2006) – A bank brought an action against mortgage brokers for arranging the sale of loans that were defaulted. The broker brought an action against the bank's underwriters seeking indemnity. The court held that the broker was not a third-party beneficiary of the agreement between the bank and its underwriters. Even if the broker could assert a claim under that agreement, such a claim would be subject to (and barred by) the contractual provision limiting the time within which a claim could be brought.

- *Wartsila NSD North America, Inc. v. Hill International, Inc.*, 436 F.Supp.2d 690 (D.N.J. 2006) – An exculpatory clause that provided for a limitation on recovery relating to lost profits and consequential damages did not preclude recovery of ordinary breach of contract damages not involving lost profits or consequential damages.

- *Forest Products Industries, Inc. v. ConAgra Foods, Inc.*, 460 F.3d 1000 (8th Cir. 2006) – A broker cannot bring an action for interference with contract based on its agreement with a seller or where the broker entered into a new contract with the seller that superseded the allegedly interfered-with contract.

- *Lazzarino v. Warner Bros. Entertainment Inc.*, 602039/05 (N.Y. Sup. Ct. 2006) – Actions taken by a party to a contract that interfered with another party's rights under a separate agreement violated a general provision of the other agreement that the party would "do nothing to interfere or diminish" with the first party's rights under the contract.

- *Bray Intern., Inc. v. Computer Associates Intern., Inc.*, 2005 WL 3371875, 58 UCC Rep Serv 2d 235 (S.D. Tx 2005) – The duty of good faith does not require performance that would preclude a party from enforcing the other provisions of the contract.

- *Advancmed, LLC v. Pitney Bowes Credit Corp.*, 2006 WL 36901, 58 UCC Rep Serv 2d 507 (E.D.Ky. 2006) – The implied covenant of good faith and fair dealing does not support an independent cause of action.

C. Jurisdiction, Choice of Law and Choice of Forum

- *Olinick v BMG Entertainment*, 138 Cal.App.4th 1286 (Cal. App. 2 Dist. 2006) – An employee based in California agreed in his employment

agreement that New York law would govern the agreement and that the New York courts would have "exclusive" jurisdiction and venue to hear "all disputes arising under" the agreement. The employee brought an age discrimination action in a California court. The court first determined that the provision covered the age discrimination claim because the provision would be read to cover "all causes of action arising from or related to" the agreement. The court analyzed the enforceability of the choice-of-law and forum selection terms under the same approach. There was no violation of a California fundamental public policy under *Nedlloyd* and *Restatement of Conflict of Laws* § 187 where the chosen law and forum provided an "adequate" remedy. The court concluded that New York law did provide an "adequate" remedy.

- *In re Miller*, 341 B.R. 764 (Bankr. E.D. Mo. 2006) – The parties to a business loan agreed that Iowa law would govern the agreement. A default rate of interest was valid under Iowa law. However, it violated Missouri law which was a fundamental public policy of Missouri. It was therefore unenforceable in a Missouri court.

- *Titan Finishes Corporation v. Spectrum Sales Group*, 452 F.Supp.2d 692, (E.D.Mi. 2006) – A choice of forum clause for litigation in a state court did not prevent removal of the action to federal court by its terms.

- *Person v. Google Inc.*, 456 F.Supp.2d 488 (S.D.N.Y. 2006) – A forum selection clause was presumptively enforceable.

- *Investools Inc. v. Waltz*, 236 N.Y.L.J. 110 (N.Y. S. Ct. 2006) – A choice of jurisdiction clause in a contract provided that the parties "irrevocably submit" to the jurisdiction of the New York courts and "waive any and all objections to jurisdiction" in New York. The court held that this was not an "exclusive" jurisdiction clause and that an action could be brought in another state.

D. Arbitration

- *Doerhoff v. General Growth Properties, Inc.*, 2006 WL 3210502 (W.D.Mo. 2006) – The court refused to enforce as unconscionable an arbitration clause in a consumer context that provided for arbitration in another state.

- *Suburban Leisure Ctr. Inc. v. AMF Bowling Prods. Inc.*, 468 F.3d 523 (8th Cir. 2006) – An arbitration provision in a contract for one transaction between two parties did not apply to a separate oral agreement between the two parties.

E. Damages

- *American General Financial Services of Illinois, Inc. v. Riverside Mortgage Company, Inc.*, 455 F.Supp.2d 822 (N.D. Ill. 2006) – A buyer of mortgage notes had a right to require the seller to repurchase the notes if the seller had made any misrepresentations in connection with the sale of the notes. When it turned out there were misrepresentations, the buyer could enforce the seller's repurchase obligations.

X. OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

A. Bankruptcy Code

1. Automatic Stay

- *In re Dawson*, 2006 WL 2372821 (Bankr. N.D. Ohio 2006) – The failure of a secured creditor to provide the code to override an ignition lock, which resulted in a car's being inoperable post-petition, violated the automatic stay.

- *In re Moore*, 2006 WL 3064781 (Bankr. D. Ariz. 2006) – A PMSI secured party's perfection of its security interest 29 days after it attached and 19 days after the debtor filed for bankruptcy did not violate the automatic stay.

2. Substantive Consolidation

- *In re Amco Insurance*, 444 F.3d 690 (5th Cir. 2006) – The court rejected on procedural grounds an attempt to consolidate substantively a corporation with an individual, its indirect parent. The court noted concerns about consolidating a debtor with a non-debtor and also emphasized that substantive consolidation is an extreme remedy.

- *Principal Life Insurance v. U.S.*, 70 Fed. Cl. 144 (Fed. 2006) – The court discusses the use of bankruptcy-remote entities in the context of a case involving whether a transfer should be respected under tax law. The court notes that trying to achieve a true sale and creating a bankruptcy-remote entity to reduce insolvency risk are non-tax business purposes for such actions.

- *Anderson v. Stewart*, 366 Ark. 203 (Ark. 2006) – The court "pierced the veil" of an LLC and held the members of a limited liability company liable for the LLC's usury violations where the "separateness" of the LLC had not been maintained.

- *In re Verestar, Inc.*, 343 B.R. 444 (Bankr. S.D.N.Y. 2006) – A creditors committee had a potential cause of action for equitable subordination – but not substantive consolidation – based on a parent company's alleged looting of a subsidiary.

- *In re Garden Ridge Corp.*, 338 B.R. 627 (Bankr. D. Del. 2006) – Substantive consolidation does not convert into mutual obligations for the purposes of setoff of a debt owed by one debtor to an employee and obligation due from the employee to a related debtor.

3. *Claims*

- *In re AB Liquidating Corp.*, 416 F.3d 961 (9th Cir. 2005) – The proceeds of a draw under a letter of credit "count" against the lessor's damages cap under Bankruptcy Code § 502(b)(6).

- *In re SubMicron Systems, Corp.*, 432 F.3d 448 (3d Cir. 2006) – Advances to a severely undercapitalized debtor by existing lenders were debt, not equity. The characterization of a loan as "debt" or "equity" requires a case-by-case analysis. The label and form of the transaction are relevant, but not dispositive. The court should make a "common sense" analysis of whether the person providing the funds expects to be repaid "no matter the borrower's fortunes" (debt) or "based on the borrower's fortunes (equity). The fact that the "borrower" was in financial difficulty did not prevent the characterization of the transaction as a "loan."

- *In re Official Committee of Unsecured Creditors of Dornier Aviation (North America), Inc.*, 453 F.3d 225 (4th Cir. 2006) – Parent corporation's sale on "credit" of spare parts to a subsidiary was treated as an equity contribution to the subsidiary, rather than a debt obligation, because: (i) the parent was an insider, (ii) the lack of a fixed maturity date for the purported loan, (iii) the debtor was not required to pay until it became profitable, (iv) the debtor's long history of unprofitability, and (v) the parent's assumption of the debtor's losses.

  Comment: Recharacterization of a debt as equity is different from (and based on different criteria than) equitable subordination. The two most common "tools" by which bankruptcy courts subordinate debt or treat debt as capital contributions are equitable subordination and recharacterization. Under Bankruptcy Code § 510(c), equitable subordination may be applied to subordinate a debt (even if secured) to the repayment of all other claims against the debtor. Equitable subordination is usually not applied absent inequitable conduct by the creditor causing harm to the debtor's

other creditors or conferring an unfair advantage on the creditor. Recharacterization of a debt as equity is not dependent on conduct that a court perceives as unfair or inequitable. Instead, the characteristics of the transaction determine whether a court will respect the characterization of the transaction as debt, or decide that it should be recharacterized as equity. The distinction is important as debt often receives some recovery in an insolvency proceeding while equity typically is extinguished. Recharacterization is a remedy not expressly recognized in the Bankruptcy Code.

- *In re American Wagering, Inc.*, 465 F.3d 1048 (9th Cir. 2006) – A finder's commission, payable in stock (but not yet paid), may not be subordinated under the rules that apply to equity holders. Bankruptcy Code § 510(1). The finder did not hold stock. Rather the valuation of the stock was the basis for calculating the finder's compensation for services.

- *In re Med Diversified, Inc.*, 461 F.3d 251 (2d Cir. 2006) – Bankruptcy Code § 510(b)'s subordination of equity claims applies to stock issued to a terminated employee in connection with the termination of the employee.

4. *Bankruptcy Estate*

   - *In re Wagers*, 340 B.R. 391 (Bankr. D. Kan. 2006) (*see* discussion in Section I.A.5).

   - *In re N.C.P. Marketing Group, Inc.*, 337 B.R. 230 (D. Nev. 2005) – A licensee's rights under a trademark license cannot be assumed or assigned by a debtor in possession without the consent of the licensor.

5. *Secured Parties, Set Off, Leases*

   - *In re Skuna River Lumber, LLC*, 352 B.R. 788 (Bankr. N.D. Miss. 2006) – Secured claimants may be surcharged under Bankruptcy Code § 506(c) for the services of an auction firm hired by the Chapter 11 debtor even though many items were purchased by secured claimants with credit bids.

   - *In re Rose*, 347 B.R. 284 (Bankr. S.D. Ohio 2006) – A secured party was entitled to an administrative expense priority for unpaid post-

petition adequate protection payments and loss in value of collateral resulting from debtor's waste.

- *Regions Bank v. Mills*, 2006 WL 2193202 (W.D. La. 2006) – A secured party's pre-petition security interest in federal farm subsidy payments did not extend to postpetition subsidies for crops planted post-petition. Bankruptcy Code § 552.

- *In re United Air Lines, Inc.,* 2006 U.S. App. LEXIS 16830 (7th Cir. 2006) – An agreement under which a debtor airline obtained a ground lease and built facilities was part of a "lease" under Bankruptcy Code § 365. That part (already performed) could not be severed from the ground-lease portion. The entire contract had to be treated as a true lease under Bankruptcy Code § 365. *See* discussion of related decision, Section I.A.4.

- *In re JZ, LLC,* 2006 WL 3782988 (Bankr. D. Idaho 2006) – A Chapter 11 debtor was a party to a license agreement. The debtor had not scheduled the contract as an asset of the estate nor had the debtor assumed the license. The court held that an executory contract that is not scheduled, treated in the plan, or assumed or rejected, "rides through" the bankruptcy case unaffected.

- *In re Pomona Valley Medical Group, Inc.,* 2007 WL 102978 (9th Cir. 2007) – Court applied the business judgment rule in deciding whether to permit the debtor to reject an executory contract in bankruptcy.

6. *Avoidance Actions*

- *In re Incomnet, Inc.,* 463 F.3d 1064 (9th Cir. 2006) – A preference recipient has "dominion" over a preferential transfer, even if the recipient is under a statutory duty to transmit the funds to a third party.

- *Haberbush v. Charles and Dorothy Cummins Family Ltd. Partnership*, 43 Cal.Rptr.3d 814, 139 Cal. App. 4th 1630 (Cal. App. 2 Dist. 2006) – The Bankruptcy Code does not pre-empt state law that gives an assignee for the benefit of creditors power to avoid a preference (rejecting Ninth Circuit's decision in *Sherwood Partners v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir. 2005)).

- *Credit Managers Association of California v. Countrywide Home Loans, Inc.*, 144 Cal.App.4 Dist. 590 (Cal. App. 4th 2006) – California's state law preference rules in connection with assignments for the benefit of creditors are not pre-empted by the Bankruptcy Code, as held in *Sherwood Partners*.

B. Consumer

- *Barrett v. JP Morgan Chase Bank, N.A.*, 445 F.3d 874 (6th Cir. 2006) – A mortgage borrower can exercise its TILA right to rescind a mortgage even after the mortgage has been refinanced. Even though security interest has been released, fees paid and other attributes of the transaction can still be rescinded.

- *Abercrombie v. Wells Fargo Bank, N.A.*, 417 F. Supp. 2d 1006 (N.D. Ill. 2006) – A provision in consumer loan agreement giving the lender the right to notice of and opportunity to cure any breach of the agreement before suit is brought did not prevent commencement of a TILA claim because the violation cannot later be cured and the cause of action does not arise out of a breach of the agreement.

C. Professionals

- *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Company*, 842 N.E.2d 471 (N.Y. 2005) – Based on the allegations of a complaint, an issuer's counsel (law firm) may have assumed a duty to deliver to an indenture trustee documents necessary to make the issuer's debt issuance secured by existing collateral under the indenture. The documents allegedly were not delivered and the noteholders accepted a discounted claim in the issuer's bankruptcy due to the possible lack of a security interest in the collateral. The court dismissed the claims against the lawyers for attorney malpractice and for negligent misrepresentation in the absence of privity or near privity between the lawyers and the noteholders. The court allowed a claim to proceed against the lawyers on the basis that they may have assumed a duty to deliver the documents.

- *Mega Group, Inc. v. Pechenik & Curro, P.C.*, 32 A.D.3d 584 (N.Y.A.D. 2006) – The decision involved the sale of a business. There was pending litigation against the entity being sold. The seller's counsel's legal

opinion did not say anything about the absence of litigation. The buyer argued that "in the opinion letter, the attorneys had a duty to disclose Halton's then pending claims against Mega." The buyer also submitted a statement from an expert who averred that:

> "a reasonable and competent attorney should recognize that, where a corporation is conveying substantially all of its assets, any opinion letter generated in connection therewith should disclose any known claims for damages as against the transferring corporation."

The court correctly rejected the proposition that the lawyer had a duty to come forward with information that was not covered by the agreed scope of the opinion letter:

> "As a term of the purchase/sale agreement, the parties to the sale carefully circumscribed the details to be contained within the opinion letter; no evidence exists that the attorneys were called upon to venture opinions beyond those agreed upon."

Comment: There may be an ethical issue if the attorney knew the client was making a false representation.

- *Weiss v. Securities and Exchange Commission*, 486 F.3d 849 (C.A.D.C. 2006) – Bond counsel in connection with an offering of municipal bonds violated the Securities Act of 1933 by the negligent issuance of an opinion concerning the risk that interest on the bonds would be taxable.

- *Hoyt Properties, Inc. v. Production Resource Group, LLC*, 716 N.W.2d 366 (Minn. App. 2006) – An attorney's false statement during settlement negotiations that there was no basis for piercing the corporate veil was grounds for rescinding the agreement.

- *Kaltenbach v. Richards*, 464 F.3d 524 (5th Cir. 2006) – An attorney can be a "debt collector" generally, and thus subject to all the restrictions imposed by the Fair Debt Collection Practices Act, even when doing nothing more than enforcing a security interest.

- *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006) – An attorney seeking to foreclose a deed of trust is a "debt collector" subject to the Fair Debt Collections Practices Act.

- *Johnson Bank v. George Korbakes & Co., L.L.P.*, 472 F.3d 439 (7th Cir. 2006) – A lender to an audit client was not a beneficiary of the contract between the borrower and its auditors.

- *Jones v. Rabanco, Ltd.*, 439 F.Supp.2d 1149 (W.D.Wa. 2006) – A law firm was disqualified from bringing an action involving an adverse position to a "former" client because the client had reasonable grounds to believe that the law firm still represented the client based on a notice provision in the contract negotiated for the client by the law firm that provided for copies of notices to go to the law firm and because there had never been a formal disengagement.

- *Virtanen v. O'Connell*, 140 Cal. App. 4th 688 (Cal. App 4th 2006) – A lawyer for a buyer of stock agreed to act as escrow holder for the stock involved in the transaction. Later, the seller attempted to terminate the transaction by sending the lawyer a written notice of rescission and demand to return the certificates. The lawyer, nevertheless, closed the transaction. The court held that the lawyer had breached his duties as escrow holder.